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The Innovations in The Ottoman Legal Administration:

The 16th Century Between Theory and Practice

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By

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To my parents, Nasser and Klinaz,
to my husband, Ahmed Ghobashy,
and to my son

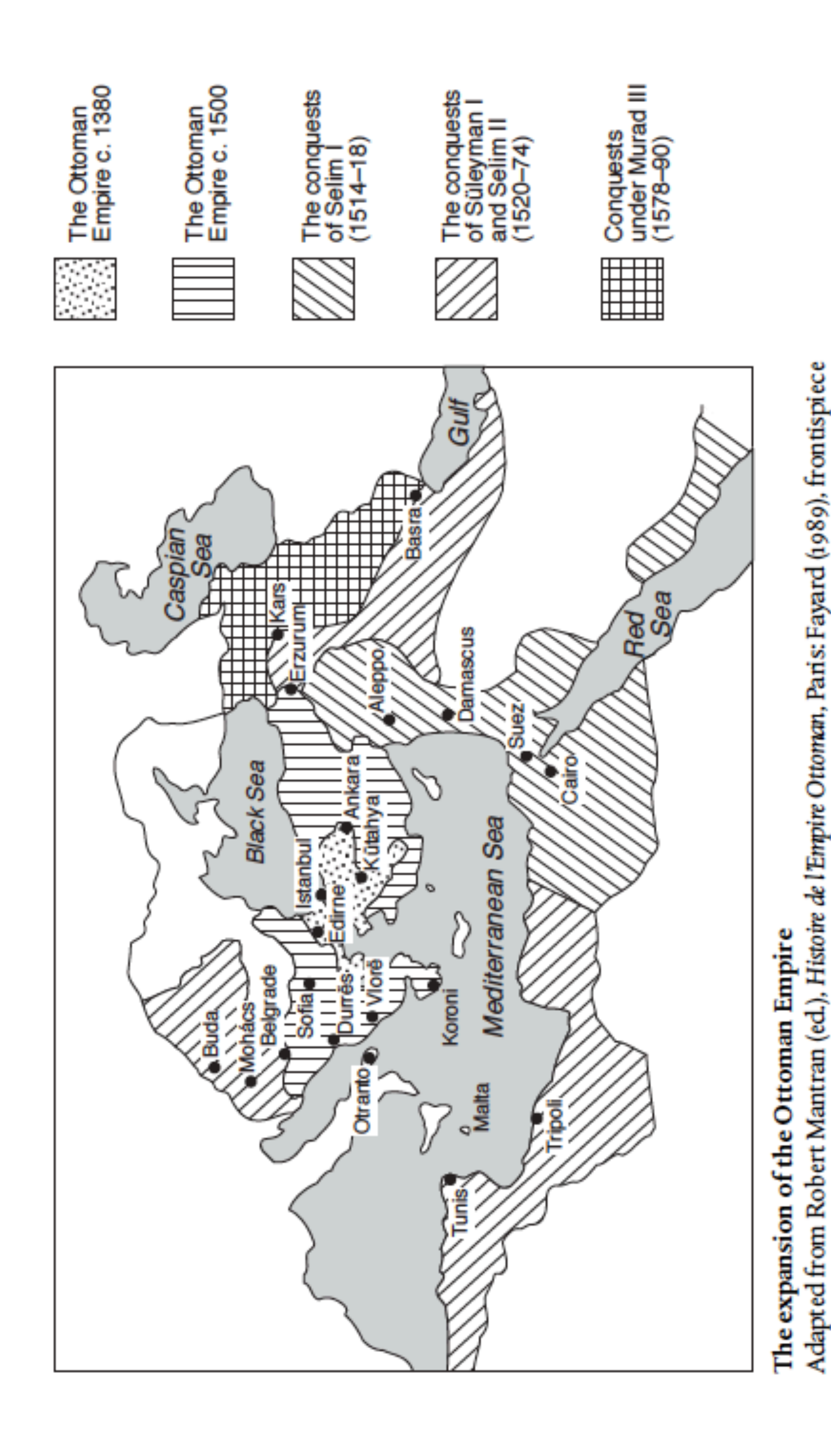
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ABSTRACT

The purpose of this study is to bring to light some of the most formative innovations in the Ottoman legal administration that unfolded by the 16th Century. It serves to macroscopically trace back some of the major developments that led to the crystallization of the Ottoman legal system and the state's administration of justice. This study thus aims to demonstrate the process of the making of Ottoman law through the early attempts of codifying a comprehensive legal code together with the creation of a unique form of "Ottoman Hanafism." Furthermore, it aims to examine the role of some of the state actors as well as the judiciary in giving rise to a bureaucratic system of administration in attempting to establish standardization and uniformity throughout the empire and in bringing in line all of the empire's provinces.



The expansion of the Ottoman Empire
Adapted from Robert Mantran (ed.), *Histoire de l'Empire Ottoman*, Paris: Fayard (1989), frontispiece

Figure 1

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INTRODUCTION

Various aspects of the bureaucratic structure of the Ottoman administration after the conquests of the 15th and 16th Centuries reveal a number of factors that are fundamental to the understanding of the broader developments of the Ottoman legal system, the introduction of a series of new policies, and the implications those developments had on the way society functioned. The incorporation of new territories and the extension of the empire to new frontiers meant that the empire now encompassed different forms of legal systems, different religious traditions, different cultural practices, as well as other forms of administering societies. With this complex legal and cultural landscape, the Ottoman authorities opted for bringing all its provinces in line with one another through a bureaucratic process of standardizing the system of administration throughout the empire. This also called for attempting to create a powerful central authority that would regulate the core-periphery relations and how the localities were administered. Furthermore, the Ottoman state intended to construct a judicial system that would serve as a tool of power assertion and would "Ottomanize" the way justice was administered.

The Ottoman innovations took a number of forms that will be examined throughout the next few chapters and fitted within the overall framework. What will be briefly mentioned here in a non-chronological order to serve the introductory purposes of this study are the wider developments of the administrative legal structure that were aimed at creating a uniform system of authority and an Ottomanized form of administering justice. Haim Gerber, Guy Burak, and Nelly Hanna draw attention to some of the most fundamental and novel administrative policies that were implemented by the Ottoman authorities. The most foundational of those developments to the Ottoman legal

system was appointing the Hanafi School of Law as the official imperial *madhhab* of the empire.[1] This meant that the legal opinions and rulings that were to be practiced were limited to what Rudolph Peters refers to as a distinctive form of "Ottoman Hanafism."[2] Other important developments that are closely interconnected with the rise of an official *madhhab* is the evolution of the religious institution, which occasioned the appearance of an imperial learned hierarchy, the appointment of *muftis* by the imperial authorities, and the appearance of the position of the grand *mufti* (*seyhulislam*) whose role was to oversee the entire religious institution.[3] This also meant that he became the institution's "chief judicial and scholarly authority,"[4] who was responsible for all its nominations.[5]

The position of the Sultan by the 16th Century also represented an integral component of the legal structure of the Ottoman central administration. The definition of justice in the golden age of Suleyman *al-Kanuni* went hand in hand with the notion of the ideal ruler.[6] The Sutlan came to be regarded as the embodiment of justice for several reasons: the power vested in him meant that he ensured the welfare of society by sustaining a stable powerful central authority;[7] the collections of legal codes and firmans decreed by Sultan Suleyman further idealized him as the "Lawgiver;" and the wide discretion he exercised when it came to executing *siyaset* punishments was maintained as

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[1] Burak, Guy. *The Second Formation of Islamic Law: The Hanafi School in the Early Modern Ottoman Empire*. Cambridge: Cambridge University Press, 2015.
[2] Peters, Rudolph. "What Does it Mean to Be an Official *Madhhab*? Hanafism and the Ottoman Empire," in *The Islamic School of Law: Evolution, Devolution, and Progress*. Eds. Peri Baerman, Rudolph Peters, and Frank E. Vogel. Cambridge MA: Harvard University Press, 2005, pp. 147-158.
[3] Burak, *The Second Formation of Islamic Law*, 11
[4] Ibid.
[5] Gerber, Haim, *Islamic Law and Culture, 1600-1840.* Leiden: Boston, 1999, p. 30.
[6] Yilmaz, Mehmet S. "Crime and Punishment in the Imperial Historiography of Suleyman the Magnificent: An Evaluation of Nişancı Celâlzâde's View." *Acta Orientalia Academiae Scientiarum Hungaricae*, Vol. 60, No. 4 (2007): 427-445.
[7] Ibid., 430.

being in the interest of society, so long as his siyasa is *'adila* and not *zalima,*[8] and representing "the fulfillment of divine justice."[9] Furthermore, the bureaucratic structure of the empire by the 16th Century meant that there was a system of administration that was based on a series of objectives and laws and not one that is based on arbitrariness and despotism.[10] This in turn magnified the just character of Sultan Suleyman's rule. Another significant development that went well into the 17th and 18th Centuries was the popular institution of petitioning the Sultan by the state's subjects against wrong done by Ottoman officials,[11] based on the encouragement of the sultan himself.[12] However, as James Baldwin argues, those petitions were not only centered on disputes between subjects and state officials, but also on disputes between the subjects themselves.[13] As such, the Sultan was, in theory, the "supreme judicial authority."[14] He was to preside over how justice was administered even if he was not the one administering it.

The Imperial Council (*divan-i Humayun*) was another form of Ottoman development that was pivotal to the bureaucratic structure of the administration of justice. The *divan* functioned as the advisory panel of the sultan on matters regarding political and military issues.[15] It was more concerned with administrative functions and other policies that did not warrant crucial decisions.[16] Apart from those functions, it also served

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[8] Heyd, Uriel. *Studies in old Ottoman Criminal Law.* Ed. V.L. Menage. Oxford: Clarendon Press, 1973, p. 199-200.
[9] Yilmaz, "Crime and Punishment in the Historiography of Suleyman," 430.
[10] Gerber, Haim. *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective*. Albany: State University of New York Press, 1994, p. 127.
[11] Ibid., 154.
[12] Inalcik, Halil. "State, Sovereignty and Law During the Reign of Suleyman," in *Suleyman the Second and His Time.* Eds. Halil Inalcik and Cemal Kafadar. Istanbul: The Isis Press, 1993, pp. 59-92.
[13] Baldwin, James E. "Petitioning the Sultan in Ottoman Egypt." *Bulletin of the School of Oriental and African Studies* 75, no. 3 (2012): 499–524.
[14] Heyd, *Old Ottoman Criminal Law*, p. 227.
[15] Imber, Colin. *The Ottoman Empire, 1300-1650: The Structure of Power*. New York & London: Palgrave Macmillan Press, 2002, p. 155.
[16] Heyd, *Old Ottoman Criminal Law*, p. 225.

as a supreme court of justice where the Grand *Vizier* adjudicated lawsuits and trials on the basis of *shari'a* and state laws or he would delegate the task to either the *Kadi-'asker* of Rumeli or the *Kadi-'asker* of Anadolu (both were also permanent members of the imperial council).[17] The imperial council was intended to function as another amicable component of preventing injustices through keeping in check the powers of the state officials, carrying out *siyaset* punishments,[18] and hearing out the subjects' grievances.[19] Furthermore, what differentiated the Ottoman imperial council from other non-Ottoman *divans* such as that of the Mamluk's *dar al-'adl* is that no muftis, not even the *seyhulislam* himself, had a seat in the council.[20] By the reign of Mehmet II, the imperial council took on a more formal structure where the sultan abandoned the tradition of presiding over the council himself and informally administering justice. He in turn assigned the presidency of the council to his Grand *Vizier* who took on the sultan's duties in the council.[21]

Another set of developments that was brought about by the Ottoman policies is the rise in prominence of the position of the *qadi*—who was an integral part of the judicial hierarchy—and the *shari'a* courts.[22] The *qadi* was intended to pass rulings in accordance to the Hanafi doctrine and the administrative laws as part of the process of standardizing the judicial system.[23] With the appearance of the courthouses in some areas

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[17] Heyd, *Old Ottoman Criminal Law*, p. 225.
[18] Inalcik, "State, Sovereignty and Law," p. 60.
[19] Ibid., 89.
[20] Heyd, *Old Ottoman Criminal Law*, p. 225.
[21] Imber, *The Ottoman Empire,* p. 156.
[22] Gerber, *Islamic Law and Culture,* p. 31.
[23] Gerber, *State, Society, and Law in Islam,* p. 63.

for the first time such as Cairo,[24] there was a lot of emphasis that was placed on the role the *qadi* played as a judge and as a mediator. However, the demand for the *qadi* went beyond just the confines of the courthouse. His role also necessitated keeping in check the power exercised by the executive authorities[25] and overseeing the marketplace.[26] Moreover, in regards to the *shari'a* courts, the Ottoman development of restructuring the court system aimed at creating a uniform judicial establishment throughout the Ottoman provinces that would standardize the way justice was administered.[27] There were a number of other innovative policies enacted by the Ottoman authorities within the court system itself that will be further discussed throughout this thesis.

One of the initial realizations of the Ottoman objectives of creating a uniform working legal system for the empire and standardizing the way justice was administered were the early attempts of codifying the law. It must be noted here that any of the above mentioned developments could not be treated in their own respect without considering the evolution of state laws. Even though the *kanunname* is often attributed to Suleyman I, the earliest attempts of codification go back to the reign of Mehmet II (1451-81).[28] However, it was only under the reign of Sultan Suleyman the Magnificent or Suleyman *al-kanuni* (1520-1566) and the enormous territorial expansion that the Ottoman legal system witnessed its greatest achievements. A lot of the policies that were enacted by the 16th Century helped set in motion the Ottoman legal developments that took place.

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[24] Hanna, Nelly. "The Administration of Courts in Ottoman Cairo," in *The State and its Servants: Administration in Egypt from Ottoman Times to the Present*. Ed. Nelly Hanna. Cairo: The American University in Cairo Press, (1995): 45-59.
[25] Peters, Rudolph. *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*. Cambridge: Cambridge University Press, 2005, p. 75.
[26] Zilfi, Madeline C. "Sultan Suleyman and the Ottoman Religious Establishment," in *Suleyman the Second and His Time.* Eds. Halil Inalcik and Cemal Kafadar. Istanbul: The Isis Press, 1993, pp. 109-120.
[27]Hanna, "The Administration of Courts in Ottoman Cairo," p. 46.
[28] Peters, *Crime and Punishment*, p. 73.

Furthermore, the promulgation of state laws and sultanic decrees by the Ottoman authorities played a great role in the regulation of the core institutional and doctrinal developments.[29] That said, the emergence of a series of Ottoman innovations in the judicial and administrative systems were a product of the Ottoman *kanun*. Moreover, to fully understand the dynamic and complex nature of the *kanun*, one has to configure the *kanun-shari'a* legal discourse that will be highlighted in one way or another throughout this present study.

By examining the series of the newly enacted Ottoman policies by the state authorities, one could further understand to what extent those novel developments contributed to the evolution and structure of the Ottoman legal system. Moreover, by analyzing how those policies were imposed from above, one could also understand how society came to be integrated into the legal system and how it interacted with it from below. With that said, the present study will explore the Ottoman innovative policies in light of the conquests of the 15th and 16th Centuries and will call into question the extent of the successes and failures of the Ottoman state's objectives to standardize and bureaucratize the system of administration. It has to be further noted here that one must take into consideration that those broader developments that the Ottoman authorities intended to implement should be treated as complex and intricate forms of policies that, in reality, truly captured the dichotomy between law and application—between theory and practice. Thus, this study will also shed light on the implications the introduction of the Ottomanized features had on state and society and how, at times, the imposition of new laws by force were met with opposition.

[29] Burak, Guy. "The Second Formation of Islamic Law: The Post Mongol Context of the Ottoman Adoption of a School of Law." Comparative Studies in Society and History, 55: 3 (2013): 579-602.

In light of the main theme of the present work—which is standardization and centralization of the Ottoman administration—, the first chapter will introduce some of the broader features that formed the main pillars of Ottoman law and that helped set in motion the rest of the Ottoman policies that will be examined in the chapters that follow. The focus here will be on the appointment of the Hanafi *madhab* as the official school of law and the codification of the *kanun*. The first section will attempt to identify the extent of the Ottoman state's involvement in the specific branch of Hanafi law and the creation of a learned hierarchy. Moreover, it will aim to examine the implications of having an official school of law amidst the conquests of the non-Hanafi Arab lands in the 16th Century. The second section will work toward highlighting the evolution of the *kanun* from the 15th Century to its peak in the 16th Century and capture the change the *kanun* introduced to the system of administration. Furthermore, this section will also draw attention to the *kanun-shari'a* discourse that has been approached by a lot of scholarly work as well as highlight how the *shari'a* was brought within the Ottoman legal context. This point of contention cannot be addressed without underlining the different approaches that scholars have taken in attempting to answer the question of whether the *shari'a* and *kanun* were in symbiosis with one another or in conflict.

The second chapter will deal with the Ottoman administration from the standpoint of the state and the different outlets that were employed to regulate the imperial central authority. The focus here will be on reviewing the role different agencies of the state played in administering justice and how they contributed to the evolution of the system of administration. This chapter will also shed light on the more intricate developments that took place within the system itself through those agents. The first section will attempt to

assess the role the sultan played as the embodiment of justice and how his position was closely interlocked with the promulgation of state laws. It will further try to elucidate how the doctrine of *siyasa shari'ya* was utilized as an extra-legal practice executed by the sultan and his state officials as a form of administering justice. The second section will examine the introduction of the Imperial Council (*divan-i Humayun*) as a novel form of administering justice and regulating administrative policies. It will attempt to study the function and structure of the *divan* and how it was intended to centralize the state's authority. Furthermore, it will help to explain the place the institution of petitioning the sultan had in the system of administration.

The third chapter is concerned with the judiciary. It will review the new features introduced in the judicial system through examining the roles the *seyhulislam* and *qadi* played in the administration of justice. It will portray the different functions they occupied in the setup of the administrative system and how they were more or less integrated in the social scene. Section one will be centered on Ebu's-Su'ud and his efforts in particular as an important contender in the process of standardizing the administrative system and legitimizing the state's authority. The second section will trace back the rise in prominence of the position of the *qadi* and the changes this institution has witnessed over the pre-modern and early modern periods as well as the question of judicial corruption.

The previous chapter will help explicate how the law and system of administration were imposed from above, while the last chapter of this study will aim to portray how society functioned within that system from below. Thus, this chapter aims to examine the law in practice and how society came to interact with the innovations of the

Ottoman policies. It will further aspire to depict how at times the restructuring of the system of administration was met with resistance, and how at other instances people were starting to integrate those newly introduced features into their daily lives. It will also examine the process of the Ottomanization of the courthouses and how they served as the platform for regulating public morality. It will study three Ottoman innovations in the fields of marriage fees, *zina* (fornication), and prostitution. The first section will deal with the reaction of the indigenous class of ulama in face of the Ottoman authorities implementing novel fees on marriage and the obligation that marriage had to be drawn by a *qadi* in court. The second and third sections will attempt to investigate crimes of sexual transgressions and how the state came to be an integral player in regulating public morality and revolutionizing how criminal law was dealt with. They will aim to study how those policies affected the way justice was administered and how they altered the Ottoman legal landscape. Furthermore, the two sections will primarily shed light on how the state brought the private affairs into the public sphere.

The focus here is not to create a comprehensive historiography that fulfills all aspects of the Ottoman law, state, and society in the 16th Century, but rather to capture snapshots in the history of the administrative developments that occurred over the pre-modern period in order to have a better understanding of how the series of those new policies fit together within the framework of standardizing and centralizing the Ottoman administration. While the main thematic fabric of this study is standardization and centralization, there are other important themes that are closely interlocked with the broader theme. One of those that will be highlighted here is the administration of justice. Through underlining the main functions and patterns of administration of the state's

enforcement agencies, this will help reveal a number of things regarding how justice was administered on the grassroot level of society. Other thematic elements that will be examined here are the changes and ramifications brought about by the introduction of new policies. Finally, a portion of this study is grounded on the concept of legitimacy. In understanding the reality of the administrator and how he based the legitimation of his rulership on the façade of justice, one could begin to formulate a clearer image of how law was imposed from above versus how it was dealt with on the ground level of society. It would further aid in explicating the reality of the core-periphery relations.

CHAPTER 1: THE OTTOMAN LAW-MAKING

This chapter will attempt to analyze the process of the making of Ottoman law and highlight the changes that were introduced to the administrative system that altered the legal landscape of the empire. It will showcase how, with the newly appropriated lands, the Ottoman legal system functioned in relation to other pre-existing systems of law and how also at other times, it had introduced new forms of state laws that were meant to ensure their dominance and centralization.[30] This chapter is meant to further draw attention to the restructuring of the legal system in light of the new features and innovations introduced by the Ottoman authorities. Furthermore, it will aim to examine how the changes that were initiated in the Ottoman administration of justice were meant to bring about a legal process of standardization and uniformity throughout the empire.

I. The Official *Madhhab*: The Hanafi School of Law

When Sultan Suleyman *al-Kanuni* visited and ordered the reconstruction of the tomb of Abu Hanifa—the founding father of the Hanafi School of Law—shortly after the conquest of Baghdad in 1535, this event had marked a significant type of endorsement of the Hanafi *madhhab* by the Ottoman dynasty.[31] The development of a distinctive form of Hanafism by the Ottoman Empire had begun earlier in the 15th Century.[32] However, in order to understand the full scope of how the Ottoman administration developed a particular branch in the Hanafi School of law and how it regulated a specific type of *shari'a* that was well-suited to their own discourse of law as well as understanding the implications those new features had on the law-making process, it is essential to first

[30] Burak, *The Second Formation of Islamic Law*, p. 14.
[31] Burak, "The Second Formation of Islamic Law," p. 581.
[32] Ibid., 582.

examine the nature of the structure and doctrine of the Hanafi school in the period of the pre-Ottoman conquest.[33]

As early as the 8th Century, the Sunni schools of law were rendered as doctrinal bodies that were based on a "loose social organization"[34] that functioned mainly within the confines of regulating the authority of opinions and governing the legal understandings of the divine text.[35] However, the emergence of the *madhhab* by the 9th and 10th Centuries to a great extent was grounded on more organized forms of doctrinal bodies that were guided by the founding fathers and their subsequent followers.[36] There were greater efforts in the later centuries to organize the structure of the authority of different opinions within each *madhhab*[37] and to curtail the efforts of *ijtihad* expounded by *qadis* and *muftis*.[38] This was largely due to the belief that scholars no longer possessed the competence that allowed for the ability to determine which views were correct and which were not.[39] As such, this called for the need to formulate a set of guiding principles to direct the scholars on which opinions to consult.[40]

By the 12th Century, there were conflicting views regarding the hierarchy of authority in the Hanafi *madhhab* seeing as that—besides the differing opinions of the founding fathers of the *madhhab* (Abu Hanifa, Abu Yusuf, and Muhammad al-Shaybani)—there were less authoritative opinions that prevailed within the Hanafi doctrine.[41] Later scholars proposed different criteria of the hierarchy of authority for

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[33] Burak, "The Second Formation of Islamic Law," p. 582.
[34] Ibid.,
[35] Ibid.,
[36] Ibid.,
[37] Ibid.
[38] Peters, "What Does it Mean to Be an Official *Madhhab*?" p. 149-150.
[39] Ibid., 150.
[40] Ibid.
[41] Peters, "What Does it Mean to Be an Official *Madhhab*?" p. 149.

scholars to adhere to. However, the one that worked its way into the structure of the Hanafi *madhhab* dictated that the first opinion to consult when faced with contradictory opinions regarding a certain matter was that of Abu Hanifa, then Abu Yusuf's, then Muhammad al-Shaybani's, then either that of Zufar or al-Hasan b. Ziyad.[42]

It is worth mentioning here that the efforts set forth in the development and structure of the Hanafi *madhhab* were not promoted by state authorities.[43] According to Burak, the practice of patronage as well as supporting and appointing certain jurists to specific positions by the state or the ruler goes back to the Umayyad and 'Abbasid eras. In the reign of the Ayyubids and Mamluks, the state could also adopt one or more schools of law.[44] However, the degree of state intervention was limited. Burak argues that state authorities did not dictate what was to be considered law and what was not. They neither interceded in the doctrinal structure of different *madhhabs* nor regulated the hierarchy of the authority of opinions.[45] This was fundamentally different from the Ottoman Empire. The Ottoman attempts to create a standardized legal system that would contribute to the bureaucratic administrative structure of the state dictated different types of practices and marked a degree of state intervention in the religious doctrine. Rudolph Peters contends that such an inconstant setup of the Hanafi *madhhab* that was characterized by the different conflicting views was difficult to convert into "positive law," as in rearrange it in such a way that was easy to be administered by the *qadi* courts.[46] Nevertheless, he argues that the Ottoman efforts of creating a particular type of Hanafism that was well-

[42] Peters, "What Does it Mean to Be an Official *Madhhab*?" p. 150.
[43] Burak, "The Second Formation of Islamic Law," p. 582.
[44] Ibid.,
[45] Ibid.
[46] Peters, "What Does it Mean to Be an Official *Madhhab*?" p. 147.

suited to their administrative requirements aided in altering the school's doctrine from one that was marked by contradictions to one that became "more or less homogenous."[47] The evolution of the Hanafi *madhhab* after the Ottoman conquests was to a large extent interlocked with the Ottoman sultan's and state authorities' intervention in the regulation and restructuring of the religious doctrine.[48] There are a number of factors that contributed to the departure of the Hanafi *madhhab* from pre-Ottoman to post-Ottoman adoption of the particular branch of Hanafism. According to Burak, "institutionally, this change was both reflected in and enabled by the development of an imperial learned hierarchy with fairly standardized career and training tracks."[49] By the early 15th Century, this imperial learned hierarchy was well established and enforced.[50] The Ottoman authorities regulated the structure of the hierarchy through the appointment of muftis and the development of the office of the Grand Mufti (*seyhulislam*) who was the head of the imperial learned hierarchy and whom also played an integral role in regulating a certain type of *shari'a*—or a certain type of Hanafism—that was consistent with the Ottoman innovations introduced by the sultan and state authorities.[51] Having said that, there is a clear divergence here from the classical role muftis played. A mufti in the classical sense was a religious expert who gave his fatwa on the basis of questions addressed to him regarding legal and religious matters. He contributed to the governance of the religious doctrine seeing as that he had the authority to exercise his own independent reasoning (*ijtihad*) in dispensing new injunctions that would guide followers of the *madhhab* and

[47] Peters, "What Does it Mean to Be an Official *Madhhab*?" p. 147.
[48] Burak, *The Second Formation of Islamic Law*, p. 10.
[49] Burak, "The Second Formation of Islamic Law," p. 584.
[50] Burak, *The Second Formation of Islamic Law*, p. 11.
[51] Ibid. A section in Chapter 2 of this study is dedicated to the office of the *Seyhulislam*.

advise judges in legal rulings.[52] Unlike *qadis*, the appointment of muftis was not a state-sponsored practice. Rather, the mufti acted as an independent scholarly authority who was free from such appointments by the ruler of the community.[53] During the Mamluk period, a jurist could teach law and dispense fatwas—thus, become a mufti—when granted the permission to do so by his mentor.[54] This is essentially different from the later Ottoman practices where the appointment of the mufti was marked by state intervention.[55]

Another factor that saw the shift from pre-Ottoman to post-Ottoman practices was the establishment of an educational system by the Ottoman Empire as yet another innovation that was introduced by the 15th Century alongside the development of an imperial learned hierarchy.[56] The imperial *madrasa* system was systematically developed by the Ottoman dynasty with a network of teaching institutions that were founded throughout the empire. This development later ordained that high-ranking judicial and bureaucratic positions required the graduation from the imperial *madrasa* system throughout the empire.[57] What separates here the Ottoman practices from previous ones is that earlier dynasties' functions in the learning institutions was in regulating its administration and funding. However, the Ottoman dynastic practices went beyond the confines of the administrative procedures of the educational institutions. They became highly involved in the regulation of the doctrine and curriculum of the *madrasa* system. There was a sultanic decree ordered by Sultan Suleyman in 1556 dictating the texts that

[52] Burak, "The Second Formation of Islamic Law," p. 584.
[53] Ibid.,
[54] Ibid.,
[55] Ibid.,
[56] Ibid., 585.
[57] Ibid.

were to be studied by the students as well as the order of studying those texts in the imperial *madrasas*.[58] Moreover, serving as an extension of the sultan, the Grand Mufti by the second half of the 16th Century gave such orders on the specific texts to be studied.[59] In being involved in the regulation of the Hanafi doctrine and curriculum of the educational system, the Ottoman authorities were opting for uniformity in the texts to be consulted and studied.

A third aspect that signals the degree of state intervention in the Hanafi doctrine is the Ottoman dynastic involvement in the genealogy (*tabaqat*) of the learned hierarchy and the regulation of the *madhhab*'s authority of opinions. Burak argues that by creating a certain chain of authority of the members of the hierarchy and tying them back to the founding father of the school, Abu Hanifa, as well as excluding the traditions of certain Hanafi jurists in other parts of the empire such as the Arab provinces, the genealogies were meant to direct members of the school to specific legal matters that they could consult in their judgments.[60] Moreover, the Ottoman authorities also intervened in the regulation of the Hanafi doctrine in determining which authority of opinion to observe. The chain of authority of opinion that prevailed in the 12th Century in the Hanafi *madhhab* was already systematized and well underway by the 16th Century in such a manner that it was readily consulted.[61] The chain of the prevailing opinions and the most authoritative ones became clearly underlined in the Hanafi *madhhab*. In their letters of appointments, *qadis* were specifically instructed by the Ottoman sultan to follow the most

[58] Burak, "The Second Formation of Islamic Law," p. 586.
[59] Ibid.,
[60] Ibid., 586-7.
[61] Peters, "What Does it Mean to Be an Official *Madhhab*?" p. 150.

authoritative of the Hanafi opinions.[62] If they did otherwise, their sentences would be nullified.[63] However, the sultan issued a number of decrees enjoining *qadis* to follow less authoritative opinions—thirty-two of those decrees alone were issued in the 16th Century.[64] Such orders made by the sultan either encouraged preferred opinions of muftis of the *madhhab* or forewent an authoritative opinion over a less authoritative one.[65] In one of the cases that prompted a sultanic order, the weaker opinion regarding the law of *qasama* was imposed. In the case where a body is found on privately owned property with signs indicating a violent murder, the next of kin have the right to demand blood money after swearing a number of oaths accusing the owners of the property of the murder. Following the opinions of Abu Hanifa and Muhammad al-Shaybani, the solidarity group of the owner of the property is held accountable for the payment of the blood money, whereas Abu Yusuf maintained the weaker opinion that the actual inhabitants of the property were to be held accountable.[66] Peters argues that the sultanic decree enforced the weaker opinion here in order to "stimulate the vigilance of the residents and their diligence in keeping their neighborhood safe, since they themselves and not their solidarity group were held liable."[67]

The* Madhhab*: From Mamluk to Ottoman

The Ottoman authorities were faced with a different challenge in the hegemony of the Hanafi *madhhab* after the conquests of the Arab regions in the 16th Century. Earlier in the

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[62] Peters, "What Does it Mean to Be an Official *Madhhab*?" p. 151.
[63] Ibid., 150.
[64] Ibid., 152.
[65] Ibid.,
[66] Ibid., 153.
[67] Ibid.

13th Century, the Mamluk Sultan al-Zahir Baybars initiated the tradition of appointing a chief *qadi* (*qadi al-qudat*) from each of the Sunni schools of law in Cairo.[68] By the second half of the 14th Century, this practice had been adopted by several other cities in the Arab region.[69] It is essential here to understand how this quadruple legal system functioned in order to fathom how the Ottoman authorities restructured the administrative system in such a way to adapt it to the legal landscape of the newly appropriated Arab lands and to bring them in line with the other provinces.

Sherman Jackson provides an interpretation behind Sultan Baybars' decision to implement a quadruple judicial system. He argues that the Chief Shafi'i *Qadi*, Ibn bint al-A'azz, alienated the opinions of jurists belonging to other *madhhabs* and curtailed the enforcement of their rulings, which went against the preference of some of the followers of the other *madhhabs*.[70] Thus, it is argued, Sultan Baybars wanted to restrain the power of Ibn bint al-A'azz by appointing three other Chief *Qadis* without officially dismissing him seeing as that he enjoyed the support of the public who were mostly affiliated with the Shafi'i *madhhab*.[71] However, Yossef Rapoport establishes a different argument that focuses on the institutional motive behind Sultan Baybars' decision rather than the political and religious objectives. He underscores two main aspects that could further elucidate Baybars' judicial ruling: the legal system's need for predictability and flexibility.[72] He argues that the system had become rigid and too inadaptable and thus

[68] Rapoport, Yossef. "Legal Diversity in the Age of *Taqlid*. The Four Chief *Qadi*s under the Mamluks," *Islamic Law and Society* 10 (2003): 210.
[69] Ibid., 210.
[70] Jackson, Sherman. "The Primacy of Domestic Policy: Ibn Bint Al-Aazz and the Establishment of Four Chief Judgeships in Mamluk Egypt." *Journal of the American Oriental Society*, 115 (1995): 52, 54.
[71] Ibid., 54.
[72] Rapoport, "Legal Diversity in the Age of *Taqlid*," p. 213.

needed to be institutionally more flexible with a predictable set of canons to follow.[73] The reason for this rigidity seemingly goes back to the 12th Century shift from the tradition of *ijtihad* to the tradition of *taqlid*.[74] As mentioned earlier, this adjustment was meant to curb the independent reasoning of judges and achieve uniformity in the implementation of rulings based on the most authoritative opinions in their respective *madhhab*.[75] According to Rapoport, "without *taqlid*, i.e., without the *madhhab* providing an objective basis for legal decisions, judicial actions would have been perceived as inherently arbitrary."[76] However, the culture of *taqlid* did not provide much room for judges to adapt the law to new social conditions.[77] It was also challenging to introduce new features to the doctrine of a *madhhab* seeing as that judges were specifically decreed in their appointments to follow only the rulings of their respective *madhhab*.[78] This also constituted a part of the rigidity of the legal system. For instance, appointing only one Chief *Qadi* from the Shafi'i *madhhab* entailed that a bride could not add stipulations in her marriage contract in accordance to the Shafi'i doctrine; however, the Hanbali doctrine allowed it. Marriage of a minor is not permitted in the Shafi'i doctrine but is allowed in the Hanafi doctrine.[79] Thus, having a quadruple judicial system offered an alternative solution to provide more flexibility for the population in raising the doctrines of all four Sunni schools to the same equal status even if they chose to follow the culture of *taqlid*.[80]

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[73] Rapoport, "Legal Diversity in the Age of *Taqlid*," p. 213.
[74] Shahar, Ido. "Legal Pluralism and the Study of Shariʿa Courts." *Islamic Law and Society* 15, no. 1 (2008): 132.
[75] Ibid.
[76] Rapoport, "Legal Diversity in the Age of *Taqlid*," p. 214.
[77] Shahar, "Legal Pluralism," p. 132.
[78] Rapoport, "Legal Diversity in the Age of *Taqlid*," p. 215-6.
[79] Ibid., 220.
[80] Ibid., 217.

Changing the institutional judicial structure in the Mamluk period accommodated the social needs of the population by allowing the individual to choose the court forum that best suited his/her interest. Ido Shahar refers to the engagement in the interrelations of the *madhhabs* as "forum shopping."[81] This "forum shopping" was at times a mechanism employed by the state through its representatives to prevent certain rulings from taking place.[82] Shahar provides the example of heresy where a person who is accused of heresy could manage for instance to appear before a Shafi'i judge—who spares the lives of the heretics who repent—before witnesses go to a Maliki *qadi*—who imposes the capital punishment on heretics—and is thus protected by the manipulation of the *madhhabs*.[83] This concept of manipulating the interrelations between *madhhabs* was also extended to other social scenes in regards to property and personal status. According to Hanna, a person could purchase a house according to one *madhhab* and get married or divorced the following day according to another *madhhab*.[84]

This legal system did not concur well with the objectives of the Ottoman authorities of attempting to enforce standardization and uniformity. The concept of "forum shopping" or having room for *madhhab* manipulation was not a system that could contribute to the hegemony of the Hanafi doctrine that the Ottomans were aiming to administer. According to Peters, "[the Ottoman state] was motivated by a bureaucratic tendency to impose uniformity in the administration of justice based on Hanafi doctrine, at the expense of pragmatic flexibility."[85] Their objective was to restructure the legal system in such a way that would yield centrality to their administration of justice, even if

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[81] Shahar, "Legal Pluralism," p. 133.
[82] Ibid., 134.
[83] Ibid., 133.
[84] Hanna, "The Administration of Courts in Ottoman Cairo," p. 53.
[85] Peters, "What Does it Mean to Be an Official *Madhhab*?" p. 156.

that meant introducing features that were met with resistance. Thus, the Ottoman authorities cancelled the Mamluk tradition of having a quadruple judicial system and replaced it with a single Hanafi Chief *Qadi* (*qadi al-qudat*) who was appointed by the sultan.[86] The *qadi* who served as the *qadi al-qudat* was typically a Turk who was not fluent in Arabic and communicated through a translator. He was assigned a one-year term in Cairo, which was to a degree a prestigious position that helped in elevating him in status.[87] The restructuring of the judicial system by the Ottoman authorities did not necessarily denote that the Hanafi law replaced the other *madhhabs*. The other Sunni schools of law continued to function with each courthouse having a *qadi* represent each *madhhab*.[88] Grasping how this system functioned is of importance here in order to have a clearer visualization of how the Ottoman authorities, on the one hand, aimed at creating a centralized legal system and how, on the other, it allowed for a degree of flexibility in the making of the law.

Even though the *qadis* and *muftis* in the Balkans and Anatolia were instructed to only exclusively apply Hanafi law, the case with the newly appropriated Arab regions was different wherein the *qadis* and *muftis* of other Sunni schools were integrated within the system.[89] In spite of the Ottoman authorities having abolished the quadruple judicial system, there still existed a degree of leeway in administering the legal rulings of other *madhhabs*. There is a difference of opinion within the Hanafi doctrine regarding the jurisdiction of *qadis* and whether it is the right of the defendant or the plaintiff to choose

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[86] Hanna, "The Administration of Courts in Ottoman Cairo," p. 45.
[87] Ibid.,
[88] Ibid.
[89] Peters, "What Does it Mean to Be an Official *Madhhab*?" p. 158.

the court forum.[90] However, the case was fairly different in the large cities of the Arab regions where there were several *qadis* affiliated with different *madhahbs* in one place and whom also exercised equal jurisdiction.[91] Thus, to limit the jurisdiction of *qadis* to a certain extent, the sultan issued a decree through a fatwa by Ebu's-Su'ud prohibiting *qadis* from hearing cases and passing judgments based on a *madhhab* that was not the defendant's choice of forum. Sentences that were to be dispensed by *qadis* against this decree would be deemed as void.[92] Peters argues that this was probably a method to curtail a previous practice in the Arab regions of implementing the Shafi'i doctrine in cases where the defendant did not appear before the court.[93] However, another distinction in the Ottoman practice that aimed at upholding Hanafi law was that even though they permitted other non-Hanafi *qadis* to pass sentences on the basis of the defendant's *madhhab,* the rulings issued also warranted the approval of the Hanafi *qadi*—who was given precedence among other *qadis*—for them to be enforced.[94] Still, there was a limit to the degree of enforcement of non-Hanafi rulings. According to the Hanafi jurists, the non-Hanafi sentences had to abide by the basic principles of Qur'an and Hadith.[95] There were also certain issues that were deemed legal by other *madhhabs* but could not be enforced by Hanafi *qadis*. One of those issues that were recognized by all *madhhabs* except the Hanafi's entailed that sentences could be delivered on the basis of an oath by the plaintiff and a testimony by one witness.[96] Judith Tucker offers an interesting example that showcases the Hanafi *muftis'* and *qadis'* endorsement of non-Hanafi

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[90] Peters, "What Does it Mean to Be an Official *Madhhab*?" p. 155.
[91] Ibid., 155-156
[92] Ibid.,
[93] Ibid.,
[94] Ibid.,
[95] Ibid., 157.
[96] Ibid.

rulings. She notes that in 17th and 18th Centuries Syria and Palestine, Hanafi jurists enforced rulings by Hanbali and Shafi'i *qadis* and requested they appear in courts when it came to the annulment of a marriage due to a husband not providing spousal support to his wife on the basis of poverty or because he had disappeared without leaving behind sufficient support. This was a case that did not necessitate an annulment of marriage based on the Hanafi doctrine; thus, Hanafi jurists were willing to endorse other non-Hanafi sentences for expediency in annulling marriages on the basis of desertion.[97]

It is intriguing to perceive how the Ottoman authorities articulated their own form of Hanafism through the interactions with other *madhhabs* and previous practices that yielded a new form of legal structure. The practices and mechanisms employed by the Ottoman authorities conveys that in spite of the Ottoman objective of upholding Hanafi law as a form of bureaucratic standardization and uniformity, it operated differently when it was faced with the legal diversity of the interrelations between the *madhhabs* in the Arab regions. Shahar argues that, "the ruling elites of both empires [Mamluk and Ottoman] were cautious not to break the fundamental institutional structure of four equally legitimate schools of law."[98] Thus, the efforts put forth by the Ottoman authorities in the restructuring of the judicial system were shaped in such a way as to integrate legal pluralism that existed in the Arab region and incorporate it in their policies of Ottomanization.

[97] Tucker, Judith E. *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine*. Cairo: The American University in Cairo Press, 1999, p. 82-5.
[98] Shahar, "Legal Pluralism," p. 139.

II. *Kanun* As Imperial Law

To further examine the Ottomanization process of standardizing and centralizing the administrative system, it is important to first understand the legal context within which the state practices and newly introduced policies took place. The previous section shed light on the internal dynamics that were behind the appointment of an official Hanafi *madhhab* and the process of altering a particular form of *shari'a* with Hanafi interpretations that fit well with the vitality of the Ottoman dynasty. Those institutional practices that introduced changes to the structure of the official *madhhab*—as well as other administrative practices that will be discussed throughout this study—all fall under the rubric of *kanun* seeing as that those practices materialized either in the form of *kanun* regulations codified by the state authorities or were legitimized by them.[99] Another vital aspect to briefly address that is of relevance here and the next chapters is the problematic dialogue of theory and practice or of law and application. This issue raises several questions in regards to which legal codes were applied and the nature of the legal administration that developed. This section will thus attempt to showcase the evolution of the *kanun* as a complex legal system that developed independently of the unique Ottomanized Hanafi doctrine in order to further understand its relation to *shari'a* and how it structured the Ottoman system of administration.[100]

The *kanun* is considered as one of the most significant innovations of the Ottoman legal system.[101] State-enacted laws in principle existed before the Ottoman Empire;[102]

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[99] Burak, "The Second Formation of Islamic Law," p. 587.
[100] Peters, *Crime and Punishment*, p. 71; Ze'evi, Dror. *Producing Desire: Changing Sexual Discourse in the Ottoman Middle East, 1500-1900.* Berkeley: University of California Press, 2006, p. 49.
[101] Gerber, Haim. "Sharia, *Kanun* and Custom in the Ottoman Law: The Court Records of 17th-Century Bursa." International Journal of Turkish Studies, Vol. 2, no. 1 (1981): 137.

however, what distinguished the *kanun* from other previous state laws were the Ottoman authorities early attempts to codify the law and standardize the legal system throughout the empire.[103] According to Gerber, the promulgation of *kanun* resulted from the need for a bureaucratic state to have a codified legal code that was to be enforced in all its provinces.[104] The *kanunname* (often referred to as state law, secular law, dynastic law, imperial law, or sultanic law) is a collection of *kanun* regulations that constitute short summaries of sultanic decrees and firmans, which came to be regarded as a distinct institutional body of laws that is separate from the *shari'a*.[105] *Kanun* was used to denote several meanings. There were the sultanic decrees that were enacted in regards to specific legal matters; there were *kanunnames* that were issued for specific groups of people or for a particular region; and there were the comprehensive *kanunnames* that were implemented on the whole empire.[106] Moreover, *kanun* at times also conveyed the same meaning as custom (*'urf*) in Ottoman texts by the 16th Century. In such cases, it was often associated with the term *kadim* (old or ancient)—*kanun-ı kadim*—to symbolize old customary practices.[107] This could be viewed as a sort of affirmation that *kanun* confirmed local customary practices, and certain *kanun* regulations were referred to as "accepted [or] local usage."[108]

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[102] Repp, Richard C. "Qanun and Shari'a in the Ottoman Context," in *Islamic Law: Social and Historical Contexts*. Ed. Aziz Al-Azmeh. New York: Routledge (1988): 124.
[103] See Schacht, Joseph. *An Introduction to Islamic Law*. Oxford: Clarendon Press, 1964, p. 91.
[104] Gerber, *State, Society, and Law in Islam,* p. 64.
[105] Heyd, *Old Ottoman Criminal Law*, p. 171.
[106] Inalcik, Halil. *The Ottoman Empire: The Classical Age 1300-1600*. Translated by Norman Itzkowitz and Colin Imber, New York: Praeger Publishers, 1973, p. 71.
[107] Heyd, *Old Ottoman Criminal Law*, p. 168; Pierce, Leslie. *Morality Tales: Law and Gender in the Ottoman Court of Aintab*. Berkley: University of California Press, 2003, p. 119.
[108] Heyd, *Old Ottoman Criminal Law*, p. 168.

The *kanun* propagated by the sultan was essentially meant to be valid for the period of his reign, but could be revoked or renewed by his successors.[109] However, most *kanuns* were confirmed seeing as that they were often regarded as common existing practices and were not changed unless there were fundamental political, social, or economic changes or if a sultan decided to dissolve certain *kanun* regulations that he deemed as religious innovations.[110] Furthermore, the most closely linked office to the imperial *kanuns* was that of the *nişancı*.[111] He operated the administrative functions of authenticating the *tuğra* (imperial seal) and other official documents.[112] The *nişancı* dealt with the process of validating the *kanuns* by drafting them and checking their consistency and correctness with other previous *kanuns*.[113] He would then validate them by first officially presenting them to the sultan and when he received his approval he would affix them with the *tuğra* and they became law.[114] Often when the *seyhulislam* or a mufti had inquiries regarding what the *kanun* was considering a certain matter they would turn to the *nişancı* for legal information.[115] After the *kanunname* had been validated, it was sent out to *qadis* and provincial governors to administer it[116] (sometimes at the request of *qadis*) with strict regulations to administer justice "in accordance with the noble *shari'a* and the exalted *kanun*."[117] However, when it came to capital or corporal punishments, they were instructed to administer them "in accordance with the imperial *kanunname*."[118]

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[109] Zilfi, Madeline C. "*Kanun*." In *Oxford Islamic Studies Online.*
[110] Heyd, *Old Ottoman Criminal Law*, p. 172.
[111] Repp, "Qanun and Shari'a," p. 126.
[112] Heyd, *Old Ottoman Criminal Law*, p. 339.
[113] Repp, "Qanun and Shari'a," p. 126.
[114] Inalcik, *The Ottoman Empire,* p. 71; Repp, "Qanun and Shari'a," p. 126.
[115] Heyd, *Old Ottoman Criminal Law*, p. 175.
[116] Pierce, *Morality Tales,* p. 116.
[117] Heyd, *Old Ottoman Criminal Law*, p. 151.
[118] Ibid.

The *kanun* generally dealt with topics that were not touched upon by the shari'a.[119] Mehemd II (1451-81)—also known as Mehmed the Conqueror—was the first sultan to enact laws that sought universal application and were regarded as a distinct body of laws separate from the *shari'a*.[120] He was responsible for the promulgation of two separate *kanun* collections; one that generally dealt with the bureaucratic structure of the state and the organization of the official posts of the class of *ulama* and his executive officials; the other dealt with taxation and fines.[121] Furthermore, the more general set of sultanic laws dealt with fiscal, criminal, and land laws.[122] Those laws were later subject to a series of modifications under Mehmed II's successor Bayzeid II (1481-1512), who renewed and enacted more comprehensive decrees.[123] However, it was not until the reign of Suleyman *al-Kanuni* that the *kanun* witnessed its greatest achievements. He was known for his promulgation of many strict sultanic decrees and for the establishment of a more developed and inclusive penal code.[124] It was also during his reign that Sultan Suleyman sought to homogenize the *kanun* with the *shari'a* and was aided by his *seyhulislam,* Ebu's-Su'ud, in the attempts of reconciling both legal codes.[125] A new *kanunname* with more modifications and additions, titled *Kanun-i 'Osmani*, was enacted in 1534 under the reign of *al-Kanuni*.[126]

By order of Sultan Suleyman, a copy of his new *kanunname* and Bayzeid's were to be placed in the courts of all towns across the empire.[127] However, implementing the

[119] Peters, *Crime and Punishment*, p. 72.
[120] Inalcik, "State, Sovereignty and Law," p. 77; Repp, "Qanun and Shari'a," p. 126.
[121] Repp, "Qanun and Shari'a," p. 126; Inalcik, "State, Sovereignty and Law," p. 77.
[122] Peters, *Crime and Punishment*, p. 73.
[123] Peters, *Crime and Punishment*, p. 73.
[124] Heyd, *Old Ottoman Criminal Law*, p. 151, 177.
[125] Zilfi, "*Kanun*."
[126] Peters, *Crime and Punishment*, p. 73.
[127] Heyd, *Old Ottoman Criminal Law*, p. 173-4.

kanunname in every province did not necessarily entail the nullification of provincial pre-existing legal codes. To steer clear of any disorders from arising from the introduction of new Ottoman policies to the local administrative systems, the Ottoman authorities did not abolish the laws or the local customs and traditions. This was also due to the fear of changes affecting tax revenues.[128] Thus, there were general surveys conducted in every *sancaks* ("the basic administrative unit of the Ottoman Empire")[129] throughout the 16th Century.[130] Those tax and population surveys aimed at keeping in check the tax revenues and statuses of different groups in each given *sancak* and also precipitated the enactment of new laws.[131] The process of drafting the *kanunname* for each *sancak* based on the survey and registration of the population entailed the commissioner of the survey to eliminate certain local practices and traditions that contradicted the *shari'a* or *kanun* and to send the rest of them to the sultan for his approval.[132] Moreover, the *sancak* surveys were also detrimental in establishing the administrative system in a given region because problems at times arose and complaints of local groups of people or the need to increase tax revenue called for the commissioner of the survey to recommend the sultan to revise or abolish certain laws.[133] Under the reign of Bayzeid II, it had become common usage to start the survey registers of each *sancak* with its local *kanunname* that would aid in the settlement of disputes.[134] However, even though each *sancak* had its own *kanunname*, it was established that they must also adhere to the general *kanunname* of the empire

[128] Inalcik, *The Ottoman Empire,* p. 71.
[129] Heyd, *Old Ottoman Criminal Law*, p. 339.
[130] Inalcik, "State, Sovereignty and Law," p. 82.
[131] Inalcik, *The Ottoman Empire,* p. 71.
[132] Ibid.,
[133] Ibid., 72
[134] Ibid.,

(*kanun-i osmani*).[135] The *kanunname* of Egypt of 1525 provides a good example here. It was divided into different chapters that detailed the administrative system and its hierarchy, which identify who the governor of Egypt is, the administrators of the smaller provinces within Egypt, the Ottoman military units, and finally the taxes that Egypt was due to pay.[136] Additionally, it specified what the duties of the governor were and the overall legal and fiscal system of the province.[137] Attached with the *kanunname* of Egypt was the survey registry that was conducted for this particular region.[138] Moreover, a copy of the *kanunname* of Egypt was instructed to be placed in the Divan of Egypt and sent out to every *qadi* to publicize it in his district.[139] This underpins the extent of the Ottoman bureaucratization attempts in creating a uniform administrative system and integrating *kanun* in the process of law making and instilling its bureaucratic character throughout the empire. For instance, in the preface of the *kanunname* of Egypt—seeing as that crimes had increased overtime—it was declared that "disputes and feuds can no longer be decided by the swords of the tongue of the guardians of the holy law [i.e. the *qadis*], but require the tongue of the sword of those empowered to inflict heavy punishment [i.e. non-*shari'a* judges]."[140] This portrays one of the ways of how *kanun* was introduced as a necessity to regulate the legal process and administer justice. Hence, it enjoined that anyone who commits a crime must be punished by both the *kanun* and the *shari'a*.[141]

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[135] Inalcik, *The Ottoman Empire,* p. 72.
[136] Hathaway, Jane and Karl K. Barbir. *The Arab Lands Under Ottoman Rule, 1516-1800.* London: Pearson PLC, 2008, p. 51.
[137] Ibid., 56.
[138] Ibid., 48-9.
[139] Heyd, *Old Ottoman Criminal Law*, p. 151
[140] Ibid., 3.
[141] Ibid.

Sultan Suleyman is known to have developed the most comprehensive body of criminal regulations in the *kanun-i osmani*.[142] According to Gerber, it was "the final and most important version of the Ottoman penal *kanun*."[143] There were many new additions in this version of *kanunname* in the field of criminal law seeing as that one of the objectives was to create a series of legislations alongside that of the *shari'a*'s for criminal procedures. However, the main objective was to protect the society against the oppressive actions of the executive officials.[144] Thus, when Sultan Suleyman initiated the series of *kanun* reforms, he aimed at curbing the power exercised by his executive officials in administering justice by placing the *qadi* in charge of overseeing their criminal proceedings.[145] Another objective that is found in the preambles of the *kanunname* was to prevent injustices from being committed. Consequently, people had to be familiar with the *kanunname* to know what rights they possessed. That being so, *qadis* and governors were commonly instructed to read out the *kanunname* in public and it was also made available for purchase in the 16th and 17th Centuries.[146]

There was a certain gap in the way some crimes were dealt with and there were no comprehensive legal provisions to enforce punishments in cases that created ambiguity. However, with the *kanunnames* of Sultan Suleyman and his predecessors on criminal punishments, the state played an integral role in the way justice was administered as it now had covered a broad range of criminal transgressions.[147] The *kanun* had thus come to act as a form of law enforcement.[148] One of the main features of its criminal code is that

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[142] Peters, *Crime and Punishment*, p. 73.
[143] Gerber, *State, Society, and Law*, p. 61.
[144] Heyd, *Old Ottoman Criminal Law*, p. 176.
[145] Peters, *Crime and Punishment*, p. 75.
[146] Heyd, *Old Ottoman Criminal Law*, p. 177.
[147] Ibid.
[148] Pierce, *Morality* Tales, p. 118.

many punishments became “fiscalized.”[149] Besides the *ta’zir* punishments that were administered, a fine (*ta’zir bi’l-mal*)[150] was prescribed usually depending on the number of strokes that were assigned.[151] The payment of a fine was considered to be one of the innovations introduced by the Ottoman authorities. In addition to the fines, punishments also took the shape of banishments, flogging, public scorn, and imprisonment.[152] Monetary fines in particular were not known to the criminal regulations of the *shari’a* and were considered by some *ulama* as an unlawful form of state revenue.[153] However, this form of punishment, besides *ta’zir,* were prescribed in most of the articles of the Ottoman criminal code when it came to crimes of sexual transgressions, theft, drinking of wine, bodily harm and killing, and other criminal provisions.[154] Fines seem to have been the favored form of penalty for regular crimes. It is argued that this was due to the fact that fines generated revenue for the state the same way taxes did.[155] Yet, this criminal penalty was abused by some of the executive officials who illicitly extorted fines. However, under one of the articles of the Ottoman criminal code, one of the protective functions of the *qadis* was to reclaim the fines illegally collected by the executive officials.[156] In the *kanunname* of Aintab of 1536, it reads, “For every crime that occurs, no matter how great or small, [the penalty] shall be decided with reference to the Ottoman *Kanun*. Force shall not be used to exact anymore than that.”[157] This depicts the

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[149] Peters, *Crime and Punishment*, p. 74.
[150] Heyd, *Old Ottoman Criminal Law*, p. 276.
[151] Peters, *Crime and Punishment*, p. 74.
[152] Pierce, *Morality* Tales, p. 118.
[153] Heyd, *Old Ottoman Criminal Law*, p. 280.
[154] Peters, *Crime and Punishment*, p. 73.
[155] Pierce, *Morality* Tales, p. 118; Heyd, *Old Ottoman Criminal Law*, p. 279.
[156] Peters, *Crime and Punishment*, p. 76-7.
[157] Pierce, *Morality* Tales, p. 118.

tight control *kanun* had in administering justice and how it aimed at protecting the people against injustices caused by the executive officials.

However, unlike modern criminal law, criminals were also subject to other forms of punishments for acts that were not addressed in the *kanunname* with prescribed penalties. Crimes that were not alluded to in the *kanunname* could be punished at the discretion of the *qadi* or executive officials through administering *ta'zir* or *siyaset* punishments.[158] *Ta'zir* and *siyaset* punishments were two of the most commonly used legal principles in the *kanun* and constitute pivotal elements in the making of Ottoman law. There are differences in the objectives of both forms of punishments. *Ta'zir* was meant to reform the acts of the offender and deter any future offences, while the objective of the *siyaset* punishments was to "protect society from persons whose acts constitute a danger to law and order."[159] The discretionary punishments of *ta'zir* were within the jurisdiction of both the *qadi* and the executive officials, while the *siyaset* punishments were the authority of the sultan and his executive officials.[160] Moreover, *ta'zir* punishments were administered in cases of crimes that transgressed the *shari'a* while the *siyaset* punishments were administered under the will of the sultan of "any act threatening public order."[161] Even though the *siyaset* punishments were long embedded in the Muslim states long before the conquests of the Ottoman Empire, they had grown a more Ottomanized character and the concept of *siyasa shari'ya* was integrated within the *kanunname* and administrative documents. Besides the enforcement of *ta'zir* punishments, the *siyaset* punishments took a more extra-legal form in the administration

[158] Peters, *Crime and Punishment*, p. 74.
[159] Ibid., p. 68.
[160] Ibid.,
[161] Ibid.

of justice. *Siyaset* were referred to capital or severe corporal punishments, which varied from execution, cutting off the hand, beard, male organs, nose, public scorn, to branding of the forehead.[162] Besides discretionary punishments administered by the *qadi* and the prescribing of fines or strokes when it comes to criminal transgressions, the *siyaset* punishments came to form a separate code of law called *siyasetname* that existed as early as Bayzeid II's reign.[163] However, it was later added with Mehmed II's criminal code. Despite being integrated within the text of the *kanunname*, the *siyasetname* had not lost its separate character. The third chapter of *kanun-i osmani* covers crimes that are dealt with *siyaseten*.[164] Those capital punishments often covered habitual crimes that were classified under the concept of "*sa'in fi'l-ard bi'l-fasad*—the fomenter of corruption in the world."[165] This concept of *sai bil'-fasad* was expanded by the Ottoman authorities and came to constitute a legal principle in the *kanun*.[166] According to Gerber, "people in Bursa were condemned to death on legal principles characteristic of the *kanun* system, such as *siyaset* and *sai bil'-fasad*."[167]

Just as there were *kanun* regulations that prescribed *siyaset* punishments to be administered by the executive officials, there were also, as mentioned earlier, regulations that were meant to keep the power exercised by the executive officials in that area in check. The Ottoman Criminal Code dictates that if a *qadi* examines the facts of a case and could not establish enough evidence for him to enforce a sentence in accordance with the *shari'a*, he is then entitled to produce a certificate (*huccet)* wherein he records and details

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[162] Heyd, *Old Ottoman Criminal Law*, p. 16.
[163] Ibid,
[164] Ibid., 111.
[165] Ibid., 195; Examples of the administration of *siyaset* punishments will be dealt with in Chapter 2 of this study.
[166] Gerber, *State, Society, and Law*, p. 73.
[167] Gerber, "Sharia, *Kanun* and Custom," p. 139.

all the facts of the case without suggesting a specific sentence. The *qadi* would then hand it over to the executive officials who would in turn produce a punishment *siyaseten*.[168] Nonetheless, the *qadi* still exercised the authority to investigate a case and prove the ill repute of a suspect before the officials could administer torture or imprison him *siyaseten*.[169] Despite bearing a separate character than that of the *kanun*, there are similarities that could be drawn between *siyasa shari'ya* and *kanun*. They both administer punishments that go beyond penalties prescribed by the *shari'a*. They both could convict and punish a suspect who is ill reputed and has a record of offences. They also allow for a testimony of a person who the *shari'a* deems as incompetent, and they permit the imprisonment and torture of a suspect in order to extract confessions. Thus, Heyd argues, "the penal *kanun* [was] a realization, at least partial, of [the] idea of *siyasa shari'ya* or *siyasa 'adila*."[170]

The evolution of *kanun* introduced a standardized legal system that was to a degree mindful of pre-existing practices and traditions to an empire that constituted a large array of different provincial enforcement agencies and judicial domains. It was far reaching in the sense that it regulated new aspects in the lives of the public by entering the realm of crimes and sexuality in a different manner than was regulated by the *shari'a*. The emergence of the state's bureaucratic and administrative system could be argued was a product of *kanun*. The Ottoman authorities attempted to restructure the state's administration in a way that would yield a more efficient administration of justice and aimed at utilizing the *kanun* as a protective function against injustices. It also served as a tool to standardize the law of procedure as well as employed certain principles in their

[168] Heyd, *Old Ottoman Criminal Law*, p. 195.
[169] Ibid.
[170] Ibid., 202.

system of administration that gave certain extra-legal actions legitimacy. As such, the *kanun* came to form the integral element of the making of Ottoman law and was often the device resorted to for the introduction of Ottomanized policies and innovations.

The Kanun-Shari'a *Discourse*

Understanding how *kanun* developed in nature as a distinct body of laws makes it less challenging for one to grasp the broad and complex relationship between *kanun* and *shari'a*. The *kanun-shari'a* discourse has been the subject of extensive scholarly work and there have been many attempts to contextualize the relationship of both codes of law and examine how they altered the Ottoman polity. As previously mentioned, the *kanun* in principle as state-enacted law was not in itself an innovation; however, it was the practice of the law that the Ottoman authorities developed and the areas that it touched upon that was unprecedented.[171] Moreover, it was how the Ottoman *kanun* was instigated and implemented vis-à-vis the *shari'a* that distinguished it from other legal systems. Often the literature that exists on the *kanun-shari'a* rhetoric is either divided on whether the *kanun* had indeed supplemented the *shari'a* or superseded it in practice. One school of thought follows the rhetoric that they were indeed in line with one another, while the other is of the opposing opinion.[172] However, when examining the Ottoman legal discourse the broad understanding of the relationship between *kanun* and *shari'a* had often been approached as one that yielded tangible tensions. There were many attempts, nonetheless, to portray the consolidative nature of both legal systems as one that was smooth and in harmony.

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[171] Schacht, *An Introduction to Islamic Law*, p. 91.
[172] Peters, *Crime and Punishment*, p. 74; Schacht, *An Introduction to Islamic Law*, p. 91.

The tensions between *kanun* and *shari'a* were most notable when it came to the field of criminal proceedings. *Kanun* often dealt with cases concerning public law and promulgated laws that regulated the relationship between the public and the state. Those were aspects that were not necessarily unequivocally covered in the *shari'a*. However, when it came to criminal law and the administration of justice, the *shari'a* had explicit regulations that pinpointed different types of punishments for specific given crimes. In spite of this, the *kanun* interfered in matters of criminal proceedings and introduced new regulations that operated outside the workings of the *shari'a*.[173] In theory, the *kanun* was meant to reaffirm *shari'a* practices and legal decisions. Indeed, this was the case when it came to some codified or non-codified laws. In several instances, the *kanun* legally conformed to penalties laid down by the *shari'a* by reiterating in wording that a crime shall be punished "in accordance with the *shari'a*;" at other times, the *kanun* adhered to the prescribed punishments of the *shari'a* without necessarily restating so.[174] However, there are many other cases that depict the extent of the divergence of the *kanun* from the *shari'a*. It was earlier revealed that the *kanun* prescribed monetary fines as a form of penalty. This was something that was at odds with the *shari'a*, especially given that those fines were at times administered to cases that necessitated *hudud* punishments under the *shari'a*. However, in order not to supersede the *hudud* punishments, it was at times specified that fines were to be implemented only in cases where the given *shari'a* punishment was not administered, except this was not necessarily always the case.[175]

When it came to capital or severe corporal punishments (*siyaset* punishments), the *kanun* prescribed *hudud* penalties but not for cases that necessitate them. For instance,

[173] Heyd, *Old Ottoman Criminal Law*, p. 180; Ze'evi, *Producing* Desire, p. 50.
[174] Ibid,. 181.
[175] Ibid.

there are several crimes that were punishable by the amputation of the hand *siyaseten*—a penalty prescribed for theft under the *shari'a*—such as "knifing people habitually and for habitually forging decrees of legal certificates."[176] There were other types of *siyaset* punishments that were unfamiliar to the *shari'a* such as castration, branding of the forehead, branding of a woman's vulva, cutting off the ear and nose, and other forms of penalties for different offences. However, the most commonly prescribed penalty was the monetary fine even for cases that required the *hadd* punishment. The *hudud* punishments were not the go-to forms of chastisement that was often employed by the state authorities.[177]

Gerber argues that the *kanun* is both a confirmation and a violation of the *shari'a*. It's a confirmation in the sense that it endorses the *hudud* punishments as state laws; yet, it violates the concept of *huquq Allah* when it preserves that murder is also a state law seeing as its not one of the *hudud Allah*.[178] It is a daunting process to fully attempt to come to terms with what the Ottomans wished to achieve by enacting *kanun*. However, there is the point of contention that is often raised in regards to the issue of political and religious legitimacy. The Ottoman authorities aimed to create *kanun* as a symbol of justice—something which resonates throughout the preambles and articles of the *kanunname* in one way or another that the main aim was to protect the common people. The Ottomans' political legitimacy became hinged on this notion of justice.[179]

When it came to the religious legitimacy of the *kanun*, however, it was not a leveled subject empty of debate. In the process of Ottoman law making, the imperial

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[176] Heyd, *Old Ottoman Criminal Law*, p. 265.
[177] Ibid.
[178] Gerber, *State, Society, and Law*, p. 63.
[179] Ibid., 63-4.

learned hierarchy became integrated in the system of administration in such a way that deemed it at times difficult and at times easy to consolidate the tensions between *kanun* and *shari'a*. Some *ulama* where at odds with the *kanun* and questioned its necessity seeing as that they believed that the *shari'a* was sufficient. On the other hand, other jurists believed that *kanun* was beneficial for the welfare (*maslaha*) of the society and that so long as it did not contradict the *shari'a*, there was no harm in the sultanic enforcement of those laws.[180] The tensions usually materialized when it came to certain *kanun* regulations that introduced innovations that were in clear contradiction with the *shari'a*,[181] such as interest charging (*riba*).[182]

According to Ze'evi, "conscious of their state's image as upholder of eternal justice, heads of the judiciary in the fifteenth and sixteenth centuries found ingenious ways to resolve the differences [between *shari'a* and *kanun*]."[183] What is important here is to address the relevancy of the emergence of an imperial learned hierarchy and the appointment of the official Hanafi *madhhab* that's doctrine was so closely regulated by the state to the legitimacy of the *kanun*. Those two developments were a product of sultanic decrees; yet, Ottoman jurists were closely involved in the process of the making of Ottoman law.[184] The emergence of both the learned hierarchy and the *kanun* were closely aligned.[185] The process of creating an imperial learned hierarchy through the regulation of a specific curriculum studied at the madrasa and the hierarchy of genealogies to be sought out as well as defined career and training tracks created a class

[180] Inalcik, *The Ottoman Empire,* p. 70.
[181] Repp, "Qanun and Shari'a," p. 128.
[182] Gerber, *State, Society, and Law*, p. 74.
[183] Ze'evi, *Producing Desire,* p. 50.
[184] Burak, *The Second Formation of Islamic Law*, p. 63
[185] Repp, "Qanun and Shari'a," p. 130.

of *ulama* that became so closely tied to the state. It grew accustomed to the state intervention and was accepting of state practices. Thus, this "spirit of accommodation" facilitated the readiness of the learned hierarchy to cooperate with the Ottoman authorities.[186] This was particularly true with the case of the *seyhulislam* whose role, alongside that of the *fatwa*, was detrimental to Ottoman law making and to the religious legitimacy of both the sultan and the state, especially in the 16th Century.[187] Thus, when it came to validating the authority of the *kanun*, it was the *seyhulislam* who the sultan often turned to in order to issue *fatwa* that kneaded its permissibility.[188] This was especially the case when it came to extra-*shari'a* regulations.

It is important to note here that the broader objective of *kanun* was to standardize the Ottoman legal system and create a uniform law of procedure that would bring all the Ottoman provinces in line with one another. It also served as a tool to reassert the power of the central authority and to regulate the core-periphery relations. However, in doing so, the *kanun* was often at odds with the *shari'a.* Thus, the lines between both were often blurred; but to only approach both legal systems as either conflicting or not becomes an overly normative attempt to place the *kanun* within the confines of the *shari'a* and not as a system that developed independently of its own. It is only fitting to treat *kanun* as a complex legal system that at times co-existed with the *shari'a* and at times it did not. At times it violated it and at times it did not. What must be considered here is not the division of the literature on this subject, but the efforts and attempts of reconciliation,

[186] Repp, "Qanun and Shari'a," p. 130-1.
[187] A section dedicated to the role of the *seyhulislam* will be covered in Chapter 3.
[188] Burak, *The Second Formation of Islamic Law*, p. 63

accommodation, and the creation of a "common vocabulary"[189] as a form of political expediency; the innovative policies that were the products of *kanun*; the restructuring of the system of administration; and finally the molding of the Ottoman legal system.

[189] Khoury, Dina Rizk. "Administrative Practice between Religious Law (SHARI'A) and State Law (*Kanun*) on the Eastern Frontiers of the Ottoman Empire." *Journal of Early Modern History* 5, no. 4 (2001): 330.

CHAPTER 2: THE AGENCIES OF THE STATE

By outlining the development process of the making of Ottoman law, it becomes less challenging to develop a canonical framework within which to place the changes that took place in the Ottoman legal administration. In order to understand the workings of the Ottoman legal system and to what extent was law applied in practice, it is essential to first grasp the setup of the Ottoman bureaucratic state. Besides the incorporation of new frontiers, the Ottoman Empire absorbed a large number of people with different identities and different backgrounds. With this degree of fluidity and lack of defined boundaries came new challenges. How was it that the Ottoman state was going to maintain such a large-scale empire over such a long period of time? The previous chapter was one attempt to answer this question; that through the development of a more comprehensive code of law, the Ottomans aimed to achieve standardization and uniformity. But the question that remains here is by which means did they administer such a state? This chapter aims at identifying the main constituents of the bureaucratic structure that had the most substantial impact in the administration of the Ottoman Empire and that were some of its most important representatives. It will showcase how the bureaucratic setup of the state was grounded in the concepts of legitimacy and justice and how the more elaborated state institutions that were developed asserted the legitimation of the Ottoman administration.

I. The Sultan

The role of the sultan in the Ottoman administration served as the basic foundation of the bureaucratic structure of the state. His capacity as the chief administrator of the empire

was rooted in his capacity to enforce his rulership.[190] The principal function of the sultan was his leadership in conquest. He used to lead the military campaigns and direct the strategies in person. This image of warrior-sultan was often celebrated, which was more of a real rather than a symbolic notion until the predecessors of Sultan Suleyman I abandoned the practice of leading the military campaigns themselves.[191] This in part was due to the impracticality of the sultan to lead the battlefield with such largely extended frontiers and the prolonged period of the military campaigns as well as the growing necessity that called for the presence of the sultan in the imperial capital.[192]

Moreover, the notion of leadership was also employed when it came to sultanic claims over rulership. According to the Hanafi doctrine, a leader asserted his legitimacy when he proved his capacity to seize and exercise power.[193] The Ottoman sultans lay claim to such legitimacy when they proclaimed themselves leaders of the holy wars waged against the infidels. Thus, the territories conquered from the infidels were rightfully theirs.[194] However, a problem arose when it came to territories usurped from the Seljuks. To reassert their legitimacy over lands seized from Muslims, they claimed that the last sultan of the Seljuk dynasty appointed as his successor the first Ottoman sultan, making the Ottoman dynasty the heirs to Seljuk lands[195]. However, the wars waged later against the Mamluks and the Safavids of Iran were a lot less subtle. The Ottoman sultans thus claimed their leadership as the most powerful defenders of Islam and *shari'a* by waging the wars against the infidels and the heretics. This entitlement to

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[190] Imber, Colin. *Ebu's-Su'ud: The Islamic Legal Tradition*. Stanford, CA: Stanford University Press, 1997, p.73.
[191] Ibid., 218.
[192] Ibid., 219.
[193] Ibid., 73.
[194] Ibid., 73.
[195] Ibid., 73.

sovereignty was later much more expanded on with the conquests of the 16th Century led by Sultan Suleyman I.[196] Those claims were further broadened to include universal sovereignty of the sultan—which was in itself an Ottoman innovation. It was Ebu's-Su'ud who formulated those claims that gave Sultan Suleyman the prerogatives to universal sovereignty, which were commemorated in the inscription above the portal of his mosque.[197] Colin Imber quotes this inscription that reads:

> "[Sultan Suleyman] has drawn near to [God], the Lord of Majesty and Omnipotence, / the Creator of the World of Dominion and Sovereignty, / [Sultan Suleyman] who is His slave, made mighty with Divine Power, / the Caliph, resplendent with Divine Glory, / Who performs the Command of the Hidden Book / and executes its Decrees in [all] regions of the inhabited quarter: / Conqueror of the Lands of the Orient and the Occident / with the Help of Almighty God and His Victorious Army, / Possessor of the Kingdoms of the World, Shadow of God over all Peoples, Sultan of the Sultans of the Arabs and the Persians, / Promulgator of Sultanic *Qanuns*, / Tenth of the Ottoman *Khaqans*, / Sultan son of the Sultan, Sultan Suleyman Khan / … / May the line of his Sultanate endure until the End of the Line of the Ages!/…"[198]

Those sultanic characteristics and attributes of a sovereign ruler were reassertions that first and foremost the sultan's legitimacy to rulership was drawn from the classical notion of divine right as the sultan came to be considered God's viceregent on earth who had rightful claims to universal sovereignty.[199] Secondly, they also credited the sultan with the right to secular sovereignty that he gained through conquests.[200] Finally, he was seen

[196] Imber, *Ebu's-Su'ud*, p.74.
[197] Ibid.,74.
[198] Ibid., 75.
[199] Heyd, Uriel. *Studies in old Ottoman Criminal Law.* Ed. V.L. Menage. Oxford: Clarendon Press, 1973, p. 227 and Imber, *Ebu's-Su'ud*, p.76.
[200] Imber, *Ebu's-Su'ud*, p.76.

as the enforcer of the *shari'a* and *kanun*, which endowed him with the authority of a legislator.[201]

When it came to administering the government, the sultan's scope of power in theory was usually limited to four specific areas of legal authority according to Hanafi theory, which covered "Friday prayer, taxation, the fifth on war booty and the fixed penalties."[202] However, in practice, the authority that the Ottoman sultan exercised went beyond the confines of those four spheres. This was in part due to the fact that the sultan decreed *kanuns* that dealt with other legal areas such as land, fiscal, and criminal laws.[203] In addition to his sultanic decrees, he exercised extra-legal forms of authority that were meant to ensure the welfare of the public. Friday prayer was one example showing the tight control of the sultan's administration. Either the sultan or his delegate would lead the Friday prayers and the imam or the preacher of the mosques in the towns and cities of the Ottoman provinces who were appointed by the government exalted the sultan's name in their speeches. This further laid claims to the sovereignty of the sultan over his people.[204] Moreover, even in cases where the government-appointed-preacher could not lead the Friday prayer, it was only through a sultanic decree and a fatwa from Ebu's-Su'ud that authorized the preacher to appoint a deputy to lead the prayers. Another aspect that showcases the extent of the sultan's authority was that the Festival and Friday prayers could only be held in places authorized by the sultan. He did not, for instance, permit them to be held in villages.[205]

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[201] Hoexter, Miriam. "*Qadi*, *Mufti* and Ruler: Their Roles in The Development of Islamic Law," *in Law, Custom and Statue in the Muslim World.* Ed. by Ron Shaham. Boston: Brill, 2007, p.79.
[202] Imber, *Ebu's-Su'ud*, p.79.
[203] Ibid., 79.
[204] Ibid., 79-80.
[205] Ibid., 81.

One of the basic functions of the Ottoman administration was to accumulate revenue,[206] and this was mostly achieved through taxation. Given the importance of such function, taxation fell under the jurisdiction of the imperial authority.[207] However, the taxes the sultan obtained often did not correspond with the Hanafi doctrine. This practice began to pose a problem starting the 15th Century when an Ottoman scholar authored a treatise declaring the illegality of the revenue raised from customs and land tenure by the sultan and called for the adherence to the *shari'a*.[208] However, it was Ebu's-Su'ud who attempted to reconcile Ottoman taxation practices with the doctrine of the *shari'a* by restating some concepts that he borrowed from the Hanafi doctrine.[209] Moreover, the spoils of war was a third area that was considered to be under the sultan's authority. According to Hanafi law, the sultan was entitled to the fifth of the war booty and the rest was to be handed over to individuals after the sultan took his share. This was considered to be another form of revenue for the sultan and his subjects.[210] However, an issue arose in regards to the legality of the ownership of goods and slaves appropriated from war. People posed questions asking Ebu's-Su'ud for the lawfulness of war booty raised from wars against Muslims or against Christians whom the sultan had formulated treaties with to which he answers with a reassertion of the sultan's authority and licit practices and eliminated any impediments to the appropriation of war booty from such wars.[211]

The fourth area that was also within the sultan's control was the fixed penalties assigned to *hudud* punishments, which were: "fornication, false accusation of fornication,

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[206] Imber, Colin. "Government, Administration and Law," in *The Cambridge History of Turkey,* 2: *The Ottoman Empire as a World Power, 1453-1603*. Eds. Suraiya N. Faroqhi and Kate Fleet. New York: Cambridge University Press, 2013, p. 205.
[207] Ibid., 81-2.
[208] Ibid., 82.
[209] Ibid., 82.
[210] Ibid., 84.
[211] Ibid., 84.

wine-drinking, theft, and highway robbery."[212] Those crimes were seen as transgressing *haqq* Allah and it was the sultan's duty to enforce their punishments. However, in reality, it was only the offence of highway robbery where the fixed penalty was enforced and was later broadened to include other crimes that were thought to threaten the welfare of society such as brigandage, which was very common in the countryside.[213] When it came to other crimes that incurred the fixed penalties it was a rather grey area seeing as that crimes such as fornication and drinking of wine were difficult to prove. Thus, the practice of executing such penalties fell under the authority of the sultan.[214] However, even in cases where the fixed penalty was not employed, there were other forms of deterrence that came to form a symbolic element of the sultan's administration of criminal acts. Right before leading his military campaigns, the sultan often issued decrees for the closure of wine-shops. Such act was believed could evoke divine assistance during the war.[215] What is more interesting is that during the reign of Sultan Suleyman I, coffee-shops, like wine-shops, were also banned. Coffee was believed to be an intoxicant that posed dangers for the public order and threatened the morality of the society.[216] There was a fatwa issued by Ebu's-Su'ud regarding this issue, stating that: "How can anyone consume this reprehensible [substance], which dissolute men drink when engaged in games and debauchery?"[217]

This establishes the fact that religion played an important role in the authority and legitimacy of the sultan. Besides the exercise of coercive measures demonstrated in the

[212] Imber, *Ebu's-Su'ud*, p. 89.
[213] Ibid., 90.
[214] Ibid., 90.
[215] Ibid., 93.
[216] Ibid., 93-4.
[217] Ibid., 93.

sultan's military campaigns and conquests, religion also served as a tool of power assertion whereas the sultan could not effectively guarantee his legitimacy without maintaining a religious image, even if it was only symbolic. It was in part through religion that a sultan could gain the acceptance and the obedience of his people, especially with a population whom the majority of were Muslims.[218] Thus, religion came to form an important feature in the sultan's administration. As seen earlier, the sultan's claims to legitimacy rested above all on rulership through divine right. Religion was a central aspect in the relationship between the sultan and his subjects. Hakan T. Karateke contends that people wished to view their sultan as religious even if they themselves were not, seeing as that "the subject saw the ruler as a kind of intermediary between God and himself, facilitating the achievement of his own ambitions."[219] This in turn could benefit the sultan in terms of securing the subservience of his people.[220] However, according to Karateke, it was insufficient for a ruler to only possess religious attributes, but for his rule to also be portrayed as such.[221] This meant that it was important to have institutions and certain acts that backed up the sultan's religiosity.[222] One aspect of this was the sultan's efforts—especially those of Sultan Suleyman I—to reconcile the *kanun* with the *shari'a*; the aim to amalgamate the administrative laws with the religious laws were seen as attempts that to an extent grounded the religious legitimacy of the sultan.[223] It was also

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[218] Hakan, Karateke. "Opium for the Subjects? Religiosity as Legitimizing Factor for the Ottoman Sultan," in *Legitimizing the order: The Ottoman Rhetoric of State Power.* Ed. Hakan and Reinkowski. Leiden Brill, 2005, p. 112.
[219] Ibid., 113.
[220] Ibid.
[221] Ibid., 112.
[222] Ibid.
[223] Göçek, Fatma. "The Social Construction of an Empire: Ottoman State Under Suleyman the Magnificent," in *Suleyman the Second and His Time.* Eds. Halil Inalcik and Cemal Kafadar. Istanbul: The Isis Press, 1993, p. 103-4.

under Sultan Suleyman I that the religious institutions reached their most developed stage.[224]

There were other attempts to advocate the religiosity of the sultan to the public. The sultan's leadership in waging holy wars against infidels was one angle of the religious rhetoric. Another way of promoting the sultan's religious character was his procession to Friday prayers and the order of transporting holy relics from Mecca to the capital. There were other such deeds that portrayed this image of the sultan. However, one of the most significant measures taken to retain his religious figure was gaining the title of "servitor of the two Holy Sanctuaries"—*hadim al-haramayn*—after the conquests of the Arab provinces of 1516-17.[225] Sultan Selim I had thus embraced this Mamluk title after the conquests, which changed the religious identity of the Ottoman sultan.[226] Inspite of the fact that no Ottoman sultan actually ever went to Mecca,[227] yet the title gave them prestige among the Muslim community and further heightened the legitimacy of their rulership as the "rightful leaders of the Hijaz."[228] Nonetheless, those rights also charged them with a magnitude of services that they had to maintain. They became involved with the maintenance of buildings and holy sites as well as the restoration of the Holy Mosque in Mecca.[229] The most important of those services, however, was securing the caravans of pilgrims heading to Mecca from robbers and Bedouins and supplying them with other

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[224] The religious institution of the *seyhulislam* serves as one aspect of the religious image of the sultan's administration; Zilfi, Madeline C. "Sultan Suleyman and the Ottoman Religious Establishment," in *Suleyman the Second and His Time*. Eds. Halil Inalcik and Cemal Kafadar. Istanbul: The Isis Press, 1993, p.109.

[225] Veinstein, Gilles. "Religious Institutions, Policies and Lives," in *The Cambridge History of Turkey*, 2*: The Ottoman Empire as a World Power, 1453-1603*. Eds. Suraiya N. Faroqhi and Kate Fleet. New York: Cambridge University Press, 2013, p. 349.

[226] Ibid., 349.

[227] Ibid., 351.

[228] Hakan, "Opium for the Subjects," p. 123.

[229] Gilles, "Religious Institutions," p. 351 and Hakan, "Opium for the Subjects," p. 122.

essentials. En route to the Hijaz, water fountains were built, Bedouins who were in control of springs were paid off, and food was subsidized during the pilgrimage and when the pilgrims reached the Hijaz.[230] However costly was the maintenance of such duties, the extent of this religious authority was of great significance to the "imperial ideology" and to the image that the sultan retained as leader and Caliph of the Muslim community.[231] It further aided in the unity of the old and new territories of the empire under the religious zeal of the sultan.[232]

The Image of Justice

Justice formed yet another constitutive rhetoric of the sultan's sovereignty over his subjects. The classical notion of justice was retained in the age of the Ottoman sultans. They regarded themselves as "guardians of God's country against oppression and tyranny…and dispensers of justice."[233] This image of the sultan as a just ruler came to form a very crucial element in his administration both in terms of legitimacy and as protector of the people against injustices. The sovereignty bestowed upon him entitled him to rule justly and enact laws that would ensure the fair administration of justice.[234] Anything else that exhausts the enforcement of just laws would impair his sovereignty. With such great emphasis placed on retaining justice, the sultan went through great measures to ensure that his administration was structured in such a way that would secure that justice was fairly dispensed.[235] One of the main functions of a just ruler was to

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[230] Hakan, "Opium for the Subjects," p. 123.
[231] Gilles, "Religious Institutions," p. 350.
[232] Zilfi, "Sultan Suleyman and the Ottoman Religious Establishment," p. 110.
[233] Heyd, *Studies in old Ottoman Criminal Law*, p. 227.
[234] Göçek, "The Social Construction of an Empire," p. 104.
[235] Ibid., 104.

protect his people against the abuse caused by his executive authorities. Thus, he was regarded as a sort of "safe-keeping" "supreme power" that safeguarded his people against the exploitative actions of his officials.[236] Moreover, the sultan regulated justice through his civil and religious administrations. His two executive officials responsible for the two administrations were his grand *Vizier* and *seyhulislam*. They were the two main representatives of the sultan's civil and religious authorities and would ensure that the sultan's just rule was effectively implemented.[237] Furthermore, the sultan would enact edicts called *adalet-names* that served as a reminder for his executive officials to not commit any acts of injustices against the public.[238] There was also an established network of agents who were dispersed amongst the public to monitor acts of injustices. The sultan himself would at times go undercover on secret tours to reveal any abuses taking place.[239]

Earlier on during the reign of the Abbasids, the Caliph did not exercise the right of legislating outside the confines of the *shari'a.* Even when he did enact laws, he coined them as a form of administration rather than legislation that served the purposes of the *shari'a*.[240] The Ottoman sultans on the other hand were a lot less subtle in their process of legislation. However, there were greater attempts made in harmonizing the *kanun* with the *shari'a*, even when the administrative laws were clearly outside the bounds of the *shari'a*.[241] This was particularly true in the reign of Sultan Suleyman I. He was the most celebrated sultan as the upholder of justice. He was glorified as the legislator (*al-Kanuni*) for championing the *kanun* and for his keenness in asserting the supremacy of the law as

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[236] Heyd, *Studies in old Ottoman Criminal Law*, p. 227.
[237] Göçek, "The Social Construction of an Empire," p. 104-5.
[238] Inalcik, Halil. "State, Sovereignty and Law During the Reign of Suleyman," in *Suleyman the Second and His Time.* Eds. Halil Inalcik and Cemal Kafadar. Istanbul: The Isis Press, 1993, p. 59-92
[239] Ibid., 62.
[240] Schacht, Joseph. "Islamic Law Under the First Abbasids; Legislation and Administration," in *An Introduction to Islamic Law.* Oxford University Press, 1967, p. 53-4.
[241] Gilles, "Religious Institutions," p. 325.

well as for creating the most comprehensive *kanunname*.[242] With more laws being legislated, there were greater measures taken to maintain that the main aims of such legislations were the welfare of the public and to protect the people against injustices caused by executive officials or judges.[243] This was one way of strengthening the sultan's centralistic hold and establishing a bureaucracy that ensured standardization and uniformity throughout the empire. With more considerable endeavors set forth by Sultan Suleyman I in establishing the authority of the law, he came to be considered as the embodiment of justice and as a "law-abiding ruler."[244]

Furthermore, Sultan Suleyman undertook a series of actions when he first ascended the throne that was aimed at securing the welfare of his subjects. He freed deportees who were forcefully brought to the capital by his father Sultan Selim I.[245] He returned the silk goods seized from Iranian and Ottoman merchants after Sultan Selim I had issued a ban on them. He also ordered the execution of certain officials who served under the reign of his predecessor and who were known to having committed injustices against the people and other such acts that underpinned "his time of justice."[246] Those efforts further idealized Sultan Suleyman I's achievements in creating a centralistic administration and were enough reason for his reign to be reckoned as the empire's Golden Age.[247] In 1595, Sultan Mehmed III proclaimed that, "formerly Sultan Suleyman Khan—may God place him in the highest if the paradises—in his days of justice

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[242] Inalcik, Halil. "Suleiman the Lawgiver and Ottoman Law," in *Islamic Political Thought and Governance: Critical Concepts in Political Science, Volume II.* Eds. Abdullah Saeed. New York: Routledge, 2011, p.57.
[243] Heyd, *Studies in old Ottoman Criminal Law*, p. 3 and Inalcik, "State, Sovereignty and Law," p. 63.
[244] Inalcik, "Suleiman the Lawgiver and Ottoman Law," p. 60 and Yilmaz, M. Sakir. "Crime and Punishment in the Imperial Historiography of Suleyman the Magnificent: An Evaluation of Nisanci Celalzade's View." *Acta Orientalia Academiae Scientiarum Hungaricae*, Vol. 60, No. 4 (2007): 430.
[245] Inalcik, "State, Sovereignty and Law," p. 64.
[246] Ibid., 63-4.
[247] Ibid., 76.

enforcement had imperial codes (*Kanunnames*) written and placed in the courts of the *kadis*, and since they had compiled with its content, no one suffered injustice and oppression and everything was taken care of the best way, and the subjects who are a trust by God lived in peace and prosperity."[248] To what extent this was true is a point of contention; however, it aids to demonstrate how Sultan Suleyman I was celebrated as a just ruler.

Fratricide and* Siyaset *Punishments

Even though there was a lot of emphasis placed on retaining the image of the sultan as a just ruler and there were times where people turned to the bureaucratic state as the dispenser of justice where authorities ensured the removal of corrupt officials who had committed offenses against the state's subjects, there are also a number of events in the history of Ottoman sultans that call this rhetoric of justice into question. It is argued that even though the sultan served as the legislator and promulgator of the law, he was not confined by the law and was himself above it.[249] Thus, it is interesting to see how the sultan dealt with challenges that threatened his authority, which could also serve as a way to demonstrate the extent of power he exercised in maintaining his absolute rule.

The challenges to the throne often emanated from within the imperial family, the administrative officials, and even from the provinces. However, it was from within the dynasty that the sultan felt most threatened.[250] Thus, to limit the extent of the dynastic threats to the sultan's rule, there were two clear-cut laws that regulated the succession to the throne; the ineligibility of females to ascend the throne, and that rulership was

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[248] Inalcik, "State, Sovereignty and Law," p.76
[249] Heyd, *Studies in old Ottoman Criminal Law*, p. 193.
[250] Imber, *Ebu's-Su'ud*, p. 207.

patrilineal, meaning that only the sultan's sons were entitled to the throne. This patrilineal method of succession went into practice starting from 1450 and up to 1595.[251] However, there were no laws regulating which son entertained the right of succession. This eventually led to civil wars breaking out and the onset of the practice of fratricide[252] between brothers over who was to succeed the father.[253] There are numerous examples of fratricide committed within the Ottoman dynasty to eliminate any threats to their sovereignty. Sultan Mehmed I (1413-1421) believed to have said when criticized over executing his brothers that, "in sovereignty, Ottoman rulers have let experience be their guide and therefore do not accept partnership in rule."[254] This practice became a custom whereas Sultan Mehmed II also executed the only brother who survived as soon as he ascended the throne. Sultan Bayzeid II remained restless during his reign until the death of his brother Cem and his sons. However, eventually, it was his own son Sultan Selim I who overthrew him in 1512 after he eliminated any rivalry to the throne by killing his two brothers and one of his brothers' sons.[255] Sultan Suleyman I's succession was a smoother one seeing as that he had no brothers. However, the predicament of whom of his sons was to succeed him started early on before Sultan Suleyman I's death. The rivalry between his two sons, Selim and Bayzeid, eventually led to Bayzeid escaping to Iran, and with the support of Sultan Suleyman I himself, Selim II ascended the throne. In due course, after striking a treaty with the Safavid shah of Iran, executioners were sent by Sultan Suleyman to execute Prince Bayzeid.[256]

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[251] Imber, *Ebu's-Su'ud*, p. 207.
[252] Fratricide in this context meant the killing of one's brother(s).
[253] Imber, *Ebu's-Su'ud*, p. 208.
[254] Göçek, "The Social Construction of an Empire," p.101.
[255] Imber, *Ebu's-Su'ud*, p. 208.
[256] Ibid. 208.

However, it was the last sultan of the 16th Century practice of fratricide that caused a public outrcry. After the death of Sultan Selim II in 1574, his only son Murad III succeeded him with no bloodshed, but later executed his four young brothers after he ascended the throne. It was his son and successor Sultan Mehmed III in 1595 who appallingly executed his nineteen infant brothers as soon as he became sultan.[257] Imber maintains that, "it seems to have been public revulsion at the slaughter of princes [by Mehmed III] who put an end to the custom of fratricide and to have initiated the practice of secluding princes so that they could not present a danger to the reigning sultan."[258] However, it was Sultan Mehmed II's provision in his *kanunname* statute, which legalized the execution of male relatives on the basis that "most of the *ulama* have declared this lawful"[259] and for the purpose of fending off any chance of civil war as well as carrying out such practice "for the sake of the order of the world."[260] It served to legitimize the practice of fratricide but did not seem to work well in appeasing the public during the reign of Mehmed III, thus putting an end to the practice.[261] Yet, challenges to the throne did not only stem from brothers, but also from other members of the sultan's family or even his executive officials. Sultan Suleyman I, for instance, executed his own son Mustafa in 1553 out of fear of being dethroned by him.[262] Moreover, the execution of his grand *Vizier* Ibrahim Paşa also serves as an interesting example of the sultan's absolute rule and the extent of his authority.[263]

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[257] Imber, *Ebu's-Su'ud*, p. 208.
[258] Ibid., 209.
[259] Repp, Richard C. The *Mufti* of Istanbul: A Study in the Development of the Ottoman Learned Hierarchy. London: Ithaca Press, 1986, p. 215-6.
[260] Heyd, *Studies in old Ottoman Criminal Law*, p. 194.
[261] Imber, *Ebu's-Su'ud*, p. 209.
[262] Ibid., 209.
[263] Inalcik, "State, Sovereignty and Law," p.74: A bloodless execution by a bowstring was reserved for members of the dynasty and high-ranking officials.

Celâlzâde Mustafa, who served as *nişancı* (1534-1556) and who authored *Tabakâtü'l-Memâlik ve Derecâtü'l-Mesâlik* that contributed to the idealization of the reign of Sultan Suleyman I, best described how justice was perceived during his time.[264] He argued that justice rested on "the absolute rule of the sultan."[265] The sultan was regarded as the only one who possessed the capability of carrying the "heavy burden" of sovereignty. The leadership that he was endowed with by God enabled him to administer justice even in cases that could not be conclusively proven.[266] Yilmaz contends that, in accordance with Celâlzâde, "the sultan's very existence serves the welfare of society due to the stability ensured by a powerful political authority."[267] It is this line of reasoning and this perception of justice that was utilized in the liquidation of threats that challenged the sultan's absolute rule.

One way that the sultans ensured the loyalty of their ministers was through marriage. Establishing foreign allegiances through marriage was abandoned in 1450 for the practice of marrying off Ottoman princesses to members of the sultan's administration.[268] This grew to become a tradition where the Ottoman sultan often married off his sister or his daughter to his grand *Vizier* so he would be bound to the dynasty in such a way that would eliminate any possibility of rebellion.[269] However, this practice was proven not to be a real guarantee. Sultan Suleyman I's grand *Vizier* Ibrahim Paşa (1523-1536) gained more eminence and power by marrying the sultan's sister in 1524.[270] He was favored by Sultan Suleyman and was appointed as grand *Vizier* against

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[264] Yilmaz, "Crime and Punishment," p. 427.
[265] Ibid., 427.
[266] Ibid., 430.
[267] Ibid.
[268] Imber, *Ebu's-Su'ud*, p. 210.
[269] Ibid., 211.
[270] Yilmaz, "Crime and Punishment," p. 437 and Inalcik, "State, Sovereignty and Law," p. 79.

all odds seeing as that he had no history or knowledge in governance.[271] The sultan had ignored appointing the candidate to the *Vizier*ate Ahmed Paşa —contrary to the traditional practice—and sent him off to become governor of Egypt.[272] Ibrahim Paşa was considered a very powerful *Vizier* who the sultan deemed as his "alter ego" in matters of administration.[273] Celâlzâde described him as a virtuous person who held high integrity and who was keen to observe justice. However, Celâlzâde argued that the character of Ibrahim Paşa had changed immensely when he gained more power and prestige after leading the conquest of Tabriz in Iran.[274] He began to listen to "dishonest and inferior people," whom one of them had seduced him into using the title of sultan seeing as that he made a great ruler. Thus, Ibrahim Paşa took up the title of "*serasker* sultan."[275] Accordingly, when Sultan Suleyman I heard of Ibrahim Paşa's undertakings, he ordered his execution *siyaseten* in 1537.[276]

Celâlzâde alleged that the execution of Ibrahim Paşa was in part due to the fact that the sultan was displeased with Ibrahim Paşa's conquest of Tabriz. Moreover, he rested the justification of his execution on that the grand *Vizier* had become "a source of injustice" who disregarded the laws and traditions.[277] However, it is safe to conclude that the actions of Ibrahim Paşa's threatened the dynastic interests of Sultan Suleyman I and acted as a contender for his absolute authority. Another line of argument is that Sultan Suleyman's wife Hürrem and daughter Mihrimah had driven the sultan to execute

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[271] Imber, Colin. *The Ottoman Empire, 1300-1650: The Structure of Power*. New York & London: Palgrave Macmillan Press, 2002, p.165.
[272] Inalcik, "State, Sovereignty and Law," p. 79 and Yilmaz, M. Sakir. "Crime and Punishment," p. 436.
[273] Yilmaz, "Crime and Punishment," p.436.
[274] Ibid., 437.
[275] Ibid.
[276] Ibid., 438 and See Imber, *The Ottoman Empire*, p.162: Sultan Suleyman was not the only sultan to execute his grand *vizier*, Mehmed II also executed his grand *vizier* after serving the longest term from 1455-1474.
[277] Yilmaz, "Crime and Punishment," p. 438.

Ibrahim Paşa and his sons from other women, Mustafa and Bayzeid by "[tampering] with [the sultan's] sentiments."[278] It is interesting to note that Mihrimah's husband, Rustem Paşa, had later become grand *Vizier* (1549-53; 1555-62).[279]

Siyaset punishments were not restricted to the execution of the sultan's sons or his officials only. Celâlzâde recalls in his *Tabakât* other incidents besides Ibrahim Paşa's where the sultan ordered executions *siyaseten*; one such case, as Heyd puts it, is as follows:

> "In 1528 the house of a Muslim in Istanbul was attacked at night by unknown persons, all its inhabitants were killed and its contents were looted or destroyed. The perpetrators were not found, but suspicion, supported by certain 'indications', fell on a certain group of non-Muslim vagrants (*levend*) who in the past had been repeatedly suspected of, or charged with, similar crimes. Thereupon about eight hundred such people were rounded up in the markets, taverns, etc. and publicly executed *siyaseten*."[280]

What is more fascinating about this case is the justification Celâlzâde gave for such an incident. He argued, gruesome as it was and despite the innocence of most of the people executed, this incident prompted fear in the wrongdoers and deterred any such future actions from taking place.[281] The sultan's wide discretion of *siyaset* punishments—a principle that found its way into the *kanun*—to deal with injustices that threatened the public order and welfare of society was regarded as a necessity. Even if, it is argued, the sultan transcends the boundaries set forth by the *shari'a*, it is justified on the basis of order and stability.[282] Upon reflecting on the case of the Istanbul executions, an Ottoman

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[278] Inalcik, "State, Sovereignty and Law," p. 80.
[279] Imber, *Ebu's-Su'ud*, p. 211.
[280] Heyd, *Old Ottoman Criminal Law*, p. 194. See also Yilmaz, "Crime and Punishment," p.440 and Imber, *Ebu's-Su'ud*, p 210.
[281] Yilmaz, "Crime and Punishment," p.440.
[282] Ibid., 440-1.

scholar in the 17th Century contends that "the very existence of the realm…depends on the threat of the Sultan's punishment (*siyaset*), and public order would break down if the people did not live 'between fear and hope.'"[283] Even when it came to executing his son Bayzeid, Sultan Suleyman I used the notion of law and order as a point of departure in carrying out the *siyaset* punishment seeing as that his son was "a rebel who caused bloodshed among innocent people," and it was the sultan's responsibility as a just ruler and protector of the people to get rid of anyone who threatened his subjects.[284]

II. The Imperial *Divan* (*Divan-ı Hümâyûn*)

The Ottoman government's most fundamental obligation was the administration of justice and the sultan's duty was to ensure that it was being fairly dispensed.[285] Even though he represented the main judicial authority and aimed at retaining his image as a just ruler, the sultan did not always administer justice himself and extended his authority to other formal organs of the state and to his executive officials.[286] The imperial *divan*, under the presidency of the grand *Vizier*, was one such organ that served as a cabinet that was in charge of the governmental affairs and also acted as a high court that was responsible for administering justice.[287] In spite of exercising authority that was subservient to that of the sultan's, the *divan* still represented the extent of the deepening of the bureaucratic organization and the centralization of the state.[288] Moreover, being at the helm of the state's administration and its enforcement of justice, the *divan* came to

[283] Heyd, *Old Ottoman Criminal Law*, p. 195.
[284] Inalcik, "Suleiman the Lawgiver and Ottoman Law," p. 61.
[285] Fodor, Pal. "Sultan, Imperial *Divan*, Grand *Vizier*: Changes in the Ottoman Ruling Elite and the Formation of the Grand *Vizier*al "TELḪĪṢ." *Acta Orientalia Academiae Scientiarum Hungaricae*, Vol. 47, No. 1/2 (1994): 71.
[286] Heyd, *Old Ottoman Criminal Law*, p. 154.
[287] Inalcik, "State, Sovereignty and Law," p. 89 and Heyd, *Old Ottoman Criminal Law,* p. 224-5.
[288] Lybyer, Albert Howe. *The Government of the Ottoman Empire in the Time of Suleiman the Magnificent.* New York: Russell & Russell, 1966, p. 188.

designate an integral part of the legal administration of the Ottoman Empire in the early period. It is thus important to understand the setup of such a structural institution, how it developed over the early period of the Ottoman Empire, and how it also came to signify part of the core-periphery relations.

The institution serving as a high court existed well before the Ottoman Empire with similar practices that were later implemented by the Ottoman authorities. Some of the purposes of previous *divans* were to establish justice, prosecute officials who transgressed the rights of the subjects, and to act as an appeal court for petitions and complaints submitted by the subjects.[289] The pre-Ottoman *divan* bore different functions and structural forms that were in one way or another similar to that of the Ottomans'.[290] However, the Imperial *divan*, serving as a continuation of the system of previous institutions of *divan*s, witnessed a series of developments and changes to its structure and functions over the 15th and 16th Centuries, which made it a lot more grounded in the bureaucratic makeup of the Ottoman state.[291]

In the early Ottoman period, the *divan* functioned as an institution that dealt with less pivotal and administrative matters on behalf of the sultan.[292] In spite of the fact that the *kanun* was in origin based on the will of the sultan, notable officials in the *divan*—the grand *vizier* or the *nişancı*—at times issued edicts on the authority of the sultan or offered suggestions to the sultan in regards to the enactment of certain decrees.[293] Thus, the *divan* had maintained part of the process of legislation. Moreover, initially, besides acting as a

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[289] Youssef, Rapoport. "Royal Justice and Religious Law: Siyasah and Shariah under the Mamluks." *Mamlūk Studies Review* Vol16, No. 1 (2012): 81-5.
[290] Pal. "Sultan, Imperial *Divan*, Grand *Vizier*," p. 71.
[291] Imber, *The Ottoman Empire*, p.155.
[292] Imber, *The Ottoman Empire*, p.154.
[293] Repp, Richard C. "Qanun and Shari'a in the Ottoman Context," in *Islamic Law: Social and Historical Contexts*. Ed. Aziz Al-Azmeh. New York: Routledge (1988): 126; Imber, *The Ottoman Empire,* p. 154; and Lybyer, *The Government of the Ottoman Empire,* p. 193.

court where the state's subjects could submit their complaints and lawsuits, the *divan* had also acted as the sultan's advisory *divan* in matters regarding political or military decisions.[294] Following the Seljuk tradition of presiding over the *divan* himself and dispensing justice,[295] the sultan, as described by an Egyptian chronicler during the reign of Bayzeid I (1389-1402), "would sit early in the morning on a broad eminence with the people standing away from him at a distance where he could see them. If anyone had suffered an injustice, he would submit it to him, and he would remove it."[296] Despite the informality of the sultan's administration of justice, there was a lot of emphasis that was placed in the early 15th century on the importance of the sultan appearing in public before his people and presiding over the *divan* himself. An interesting story that depicts the importance of such an event as retold by Imber, reads as follows:

> "When [Mehmed I (1413-21)] died, the [*Vizier*s] sought to conceal the fact until the arrival of his elder son, Murad, to take the throne. They continued to hold a *divan* every day at the Sultan's 'Gate'—presumably in the Palace at Edirne—'giving out governorships and fiefs and seeing to affairs.' However, when a group of soldiers threatened rebellion because they had not seen the sultan, the [*Vizier*s] brought the corpse to the gate, with a lad behind to move its arms, so that it would appear as if the sultan were alive and stroking his beard."

Pal Fodor holds that the two separate functions of the sultan administering justice and the grand *Vizier* and other members acting as an informal advisory *divan* for decision-making were retained by two separate organs.[297] The first witnessed the informal process of the sultan dispensing justice out in the open in the 14th and early 15th Century, while the

[294] Imber, *The Ottoman Empire,* p. 155.
[295] Inalcik, Halil. *The Ottoman Empire: The Classical Age 1300-1600*. Translated by Norman Itzkowitz and Colin Imber, New York: Praeger Publishers, 1973, p. 89.
[296] Imber, *The Ottoman Empire*, p. 155.
[297] Pal, "Sultan, Imperial *Divan*, Grand *Vizier*," p. 71.

second "attended to political and governmental issues, giving counsel and making arrangements for the sultan's decisions."[298] However, with Murad II delegating the task of administering justice to the *kadi-'asker* in the 15th Century,[299] and Mehmed II later abandoning the tradition of presiding over the *divan* himself and delegating its presidency to the grand *Vizier*,[300] a "Great *Divan*" had begun to develop into a formal organ of governance that acted on behalf of the sultan and that unified the different functions carried out by the sultan and members of the *divan*.[301] However, even though the grand *Vizier* had assumed the role of the sultan in presiding over the *divan*, this did not necessarily entail that the sultan was unaware of what happened within the *divan*. First off, it was the grand *Vizier*'s duty to inform the sultan with all the discussions and deliberations that took place after the *divan* meetings were held.[302] Secondly, the sultan had a "small square window" overlooking the *divan* chamber to listen to what took place during the sessions without being seen.[303] Thus, the members of the *divan* were always aware of the possibility of the sultan listening in on the *divan* proceedings; hence, members could not conceal from the sultan whatever discussions unfolded.[304] Some attribute the creation of the window to Mehmed II while others credit it to Suleyman I.[305]

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[298] Pal, "Sultan, Imperial *Divan*, Grand *Vizier*," p. 71-2.
[299] Ibid., 72.
[300] Imber, *The Ottoman Empire,* p. 156. See also Lybyer, Albert Howe. *The Government of the Ottoman Empire in the Time of Suleiman the Magnificent.* New York: Russell & Russell, 1966, p.188. He maintains that it was Sultan Suleyman I who had abandoned the tradition of presiding over the *divan*. However, most secondary sources attribute the desertion of the practice to Mehmed II.
[301] Pal, "Sultan, Imperial *Divan*, Grand *Vizier*," p. 72.
[302] Imber, *The Ottoman Empire,* p.157; the New Palace was the designated place for the Imperial *Divan* starting the 1470s. However, in the 18th Century the meeting place of the *divan* became in the grand *vizier*'s residence (Inalcik, *The Ottoman Empire: The Classical Age,* p. 90).
[303] Inalcik, *The Ottoman Empire: The Classical Age,* p. 90.
[304] Imber, *The Ottoman Empire,* p.157.
[305] Imber, *The Ottoman Empire,* p. 157 and Inalcik, *The Ottoman Empire: The Classical Age* p. 90.

Nonetheless, references show that the sultans continued to watch over the *divan* chamber through the window well into the 17th Century.[306]

***Structure and Membership of the Imperial* Divan**

By the reign of Mehmed II, the main posts and functions of the members of the *divan* had already been established. The number of members had largely increased over the years; however, the functions of the most important members had remained intact.[307] Membership of the *divan* consisted of the *Viziers*, the military judges (*kadi-'asker*), the treasurers (*defterdar*), and the *nişancı.* Besides dealing with the military and political affairs of the *divan*, the *Vizier*s also took part in the military campaigns under the authority of the sultan or another commander higher in rank. The *kadi-'askers*—who sat beside the *Vizier*s and were permanent members of the *divan*—were the chief judges responsible for the judicial affairs of the *divan*. The *defterdar* was in charge of the financial department, while the *nişancı* was the affixer of the sultan's *tuğrâ* and ensured the authentication of documents and decrees. The former two sat below the *Vizier*s and *kadi-'askers*.[308]

Initially, there were three *Vizier*s who were members of the *divan* in early 15th Century. This continued to be the case until the number increased to four in mid-16th Century, and to eleven by the 17th Century.[309] However, it is difficult to tell who were the full-time members seeing as that during the 17th Century, *Vizier*s were ordinarily dispatched to serve in the provinces.[310] The creation of the position of *kadi-'asker* dates

[306] Imber, *The Ottoman Empire,* p.157.
[307] Ibid., 157.
[308] Ibid., 157-8 and Heyd, *Old Ottoman Criminal Law*, p.338-9.
[309] Imber, *The Ottoman Empire,* p. 158.
[310] Ibid., 158.

back to the time of Murad I. There had been a single *kadi-'asker* until towards the end of Mehmed II's reign when grand *Vizier* Mehmed Paşa of Karaman created the post of a second *kadi-'asker*—who became the *Kadi-'asker* of Rumelia—to counteract the authority of the other *kadi-'asker*—who was promoted to the post of *Kadi-'asker* of Anatolia.[311] The number of *defterdars* had also increased over the years to four by the end of 16th Century. This is argued to be due to the fact that there were growing financial pressures merited by deficits in revenue because of inflation and unprofitable military conquests. Moreover, there are no references that indicate that there was more than one *nişancı*—a post which is believed to date back as early as the 15th Century.[312] Those four senior posts came to represent the different domains of the empire: "the political, judicial, and financial." [313] Those three realms represented the sultan's administration. Furthermore, despite the earlier interchanges that took place between the different posts—where a *kadi-'asker* could become *Vizier* or a *nişancı* a grand *Vizier*—this changed by the 16th Century where each post became exclusive with specified functions and careers.[314] However, even though the posts had taken a more designated form by the 16th Century, the division of tasks goes back to the *kanunname* of Mehmed II where it detailed the jurisdiction of authority of the four leading members of the *divan*.[315] The degree of power that each member exercised did not necessarily entail the sovereignty of decisions. The grand *Vizier*, for instance, could not issue financial decisions without the knowledge of the *defterdar*. Thus, there had to be coordination in the decision-making process between members of the *divan* and opinions of executive members could not be

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[311] Imber, *The Ottoman Empire,* p. 158-9.
[312] Ibid., 159-60.
[313] Inalcik, *The Ottoman Empire: The Classical Age,* p. 93.
[314] Imber, *The Ottoman Empire,* p. 160.
[315] Pal, "Sultan, Imperial *Divan*, Grand *Vizier*," p. 73.

overlooked, not even by the grand *Vizier* himself. In all probability, this was meant to balance out the power between members in the *divan*.[316]

Besides the four executive members, there were others who, by the 16th Century, also occasionally sat in the *divan*. Some of who were the commander-in-chief (*beglerbégi*) of Rumelia, the grand-admiral, and the *ağa* of the Janissaries.[317] Additionally, there was an increase in the number of clerks by the 16th Century who served under each domain represented in the *divan* who were responsible for administrative work. By 1627-8, the number of clerks amounted to 115.[318] Furthermore, it is noteworthy here that despite of the significant position he employed in the state's administration, which became also significantly higher in rank than that of the *kadi-'asker*,[319] the *seyhulislam* did not sit in the Imperial *Divan*.[320] This was different from other previous *divan*s in Muslim states and the Mamluk *Dar al-'Adl* where there was a seat dedicated to the *mufti*.[321] However, the *seyhulislam* was at times requested to appear before the *divan* for advice in regards to certain cases.[322] In the renowned case of the heretic Molla Kabız in 1527—who had preached the superiority of Jesus over Muhammad and other controversial doctrines—the grand *Vizier* Ibrahim Paşa turned the case over to the *kadi-'askers* of Rumelia and Anatolia.[323] However, Celâlzâde Mustafa argued that given their lack of knowledge on matters regarding the *shari'a*, the *kadi-'askers* failed to refute the arguments of Kabız who had cited verses from the Koran and

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[316] Pal, "Sultan, Imperial *Divan*, Grand *Vizier*," p. 73-4.
[317] Inalcik, *The Ottoman Empire: The Classical Age,* p. 94.
[318] Imber, *The Ottoman Empire,* p. 169.
[319] Repp, "Qanun and Shari'a in the Ottoman Context," p. 28-28.
[320] Imber, *Ebu's-Su'ud*, p. 7.
[321] Rapoport, "Royal Justice and Religious Law," p. 76 and See Heyd, *Studies in old Ottoman Criminal Law,* p. 225n.
[322] Heyd, *Old Ottoman Criminal Law*, p. 241.
[323] Repp, "Qanun and Shari'a in the Ottoman Context," p. 234. See also Yilmaz, "Crime and Punishment," p. 438-9.

hadith; thus, they "could find nothing to say save *hakamtu bi-kathlihi* ['I sentence him to death']."[324] Seeing as that Ibrahim Paşa believed that the case required to be dealt with in accordance with the *shari'a* and not '*urf* as well as the inability of the *kadi-'askers* to make sound religious counter arguments, the grand *Vizier* set Kabız free from the *divan*. However, Sultan Suleyman I, who had been listening to the case through the window overlooking the *divan* chamber, decided that there were other competent men in the religious fields and requested the presence of the *seyhulislam* Kemalpaşazade and the *qadi* of Istanbul Sa'di Çelebi to reexamine the case before the *divan*.[325] In the course of the retrial, the *seyhulislam* refuted Kabız's heretical arguments intelligibly and asked him if he wished to renounce them. When he rejected, the *seyhulislam* turned the case over to the *qadi* to give his sentence, who in turn again asked Kabız to renounce his beliefs. When he refused once more, he was sentenced to death.[326]

Seeing the importance and weight given to the opinion and legal advice of *seyhulislam*, the question remains of why he did not have a seat in the *divan*. One argument holds that there was a growing need to create a religious figure who would act as a symbol of the *shari'a* and who would hold a character that was markedly distinct from the government's secular character.[327] The imperial *divan* was seen as the embodiment of that secular government, and there was desire to protect the *seyhulislam* from the "taint of secularism."[328] Another argument maintains the inferiority of the office of *seyhulislam* in the 15th Century on the grounds that the *kadi-'asker*'s salary exceeded

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[324] Repp, "Qanun and Shari'a in the Ottoman Context," p. 234.
[325] Ibid., 235.
[326] Ibid., 235-6.
[327] Repp, *The Mufti of Istanbul,* p. 300.
[328] Ibid., 301.

that of the *seyhulislam*'s. However, it is again argued that the "lowness" of his salary was also due to the desire to protect him from the "accusation of worldliness."[329]

The leading officeholder of the sultan's administration was the grand *Vizier*. He was considered as the second in command after the sultan,[330] and as mentioned earlier, his "alter ego."[331] In the *kanunname* of Mehmed II, the grand *Vizier*'s status was closely described as follows: "Know that the grand *Vizier* is, above all, the head of the *Vizier*s and commanders. He is greater than all men; he is in all matters the sultan's absolute deputy. The *defterdar* is deputy of the Treasury but under the supervision of the grand *Vizier*. In all meetings and in all ceremonies the grand *Vizier* takes his place before all others."[332] With this extent of power vested in him, some could argue that the grand *Vizier* ran the empire for the sultan. Bearing this kind of prestige and high rank, no other officeholder could question or restrict the authority of the grand *Vizier*.[333] He was the sultan's confidant who was contended to be the only one aware of the state of affairs and no one could interfere between him and the sultan in regards to their secret dealings and decisions.[334] He reached a power height where he could take decisions and make appointments or dismissals without the sultan's approval.[335] Furthermore, serving as the "military commander and the sultan's absolute deputy in civil administration" was something that was unprecedented in Muslim states and a novel form of authority that the grand *Vizier* began to exercise under the reign of Murad I.[336] With such great power and authority entrusted to the grand *Vizier*, out of fear of rivalry, Mehmed II began the

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[329] Repp, *The Mufti of Istanbul,* p. 301.
[330] Pal, "Sultan, Imperial *Divan*, Grand *Vizier*," p. 71.
[331] Heyd, *Studies in old Ottoman Criminal Law*.
[332] Inalcik, *The Ottoman Empire: The Classical Age,* p. 94.
[333] Pal, "Sultan, Imperial *Divan*, Grand *Vizier*."
[334] Inalcik, *The Ottoman Empire: The Classical Age,* p. 95.
[335] Ibid., 94-95.
[336] Ibid., 95.

traditional practice of appointing a grand *Vizier* who was an offspring of peasants and did not come from dynastic lineage as earlier grand *Vizier*s did.[337] Moreover, attending to the presidency of the *divan*, the grand *Vizier* had a multitude of functions. His chief responsibilities were to maintain social and political order, hear out petitions, and administer justice.[338] He also exercised the right of supervision of all governmental departments and it had become the custom that decisions issued by the grand *Vizier* in the *divan* could not be turned down by the sultan.[339] Almost all matters had to go through the grand *Vizier* first for confirmation, even orders passed by the sultan.[340] Thus, in large, the grand *Vizier* came to constitute an important element in the policy-making process and administration of the Ottoman Empire.

Despite exercising such a vast authority, the grand *Vizier*'s power was not unlimited. Even though he possessed the authority of taking decisions without consulting the sultan at times, the grand *Vizier* still had to consult with other members of the *divan* before issuing important rulings. One of the reasons for the execution of Ibrahim Paşa was that he ceased to consult other members. Moreover, there were a number of grand *Vizier*s who were executed other than Ibrahim Paşa for threatening the absolute power of the sultan.[341] The appointment of other members was at times meant to curb the powers of the grand *Vizier*. The nomination of the chief *defterdar* under the reign of Murad III was one such example. Furthermore, the leading officeholders of the financial and judicial departments of the government were appointed by the sultan and were the

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337 Imber, *The Ottoman Empire,* p. 162, 164.
338 Pal, "Sultan, Imperial *Divan*, Grand *Vizier*," p. 74.
339 Inalcik, *The Ottoman Empire: The Classical Age,* p. 97.
340 Ibid.
341 Inalcik, *The Ottoman Empire: The Classical Age,* p. 95; Nasuh Pasha is another example of a grand *vizier* who was executed in 1614.

absolute representatives of their own domains.[342] With such division of functions in the state's administration, the power of the grand *Vizier* could not have been absolutely unrestricted. Additionally, the apparatus of the *divan* was meant to promote the various opinions of its members, which also acted as a form of power check to balance out the degree of authority exercised by each member.

Furthermore, according to Inalcik, "the ulema represented the greatest power within the state independent of the grand *Vizier*."[343] The appointment of *qadis* and other religious figures fell under the jurisdiction of the *kadi-'askers* and not the grand *Vizier*. Moreover, the *seyhulislam*—despite not being a member of the *divan*—at times acted as the grand *Vizier*'s adversary. Exercising control over the judiciary and the appointments or dismissals of *qadis* in important provinces, the *seyhulislam* embodied a degree of authority that served to counteract that of the grand *Vizier*'s.[344] An event that took place between Muhyiddin Çelebi[345] and Ibrahim Paşa—one of the most powerful grand *Vizier*s—serves as an interesting example that showcases the degree of enmity that at times existed between the two. One day, when Muhyiddin Çelebi heard a case in the *divan* to give his opinion but chose to delay the judgment on the grounds of wanting to establish all the facts of the case, Ibrahim Paşa in turn argued that there was no reason for delay given his previous knowledge of the case as he "bore witness to it…and [believed] that the truth was clear." To Ibrahim Paşa's surprise, Muhyiddin Çelebi response was that the grand *Vizier*'s statement was inadmissible in accordance with the *shari'a*, seeing as

[342] Inalcik, *The Ottoman Empire: The Classical Age,* p. 95.
[343] Ibid., 96.
[344] Ibid.
[345] Repp argues that the attitude Muhyiddin Çelebi (d. 1548), *seyhulislam* during the reign of Sultan Suleyman I, had towards Ibrahim Paşa was because he was in alliance with Ahmed Paşa (who was the runner-up of the office of grand *vizier* but Sultan Suleyman appointed Ibrahim Paşa instead of him) to "bring down" Piri Mehmed Paşa—(grand *vizier*: 1518-1523).

that Ibrahim Paşa was "an unmanumitted[346] slave."[347] When Ibrahim Paşa complained to Suleyman I about how Muhyiddin Çelebi humiliated him, Suleyman responded that the *seyhulislam* was "a speaker of the truth, firm in the faith." Thus, the sultan could not interfere with his judgments, but also that Ibrahim Paşa was indeed a freed slave. However, when Ibrahim Paşa went back to Muhyiddin Çelebi demanding that he considers his testimony as admissible, the *seyhulsilam* still did not take his word for it and demanded that the sultan confirmed it. Adding to the grand *Vizier*'s humiliation, the *seyhulislam* got hold of the document of manumission from the sultan that Ibrahim Paşa was indeed a freed slave and presented it to the grand *Vizier* before members of the *divan*, stating that he could now accept his testimony. This is a compelling example that showcases that despite the grandeur and prestige the grand *Vizier* possessed, his power was not absolute and could be threatened by other representatives of the sultan. Moreover, even though the grand *Vizier* was the "absolute deputy" and second man in command after the sultan, this did not necessarily mean that the sultan always sided with him. It also shows the strength of authority and status that the *seyhulislam* came to represent by the 16th Century.

The Functions of the Imperial* Divan *and the Institution of Petitioning

Members of the *divan*, under the leadership of the grand *Vizier*, met four times a week to discuss military, administrative, political, and financial issues.[348] However, it is significant here to examine how the imperial *divan* functioned as the empire's supreme court of justice. In the Seljuk and Mamluk traditions, complaints bearing an

[346] Meaning that he was not freed from slavery.
[347] Repp, *The Mufti of Istanbul,* p. 269.
[348] Heyd, *Old Ottoman Criminal Law*, p. 225.

administrative nature were handed over to members of the *divan*, while complaints that fell within the jurisdiction of the *shari'a* were dealt with in the *qadi* courts.[349] Here, the Ottoman practice differs from previous practices. The grand *Vizier* exercised the authority of giving sentences in all matters in accordance to both the *shari'a* and the *kanun*.[350] At times, the grand *Vizier* extended his authority to pass sentences to the two *kadi-'askers* if the cases were too many.[351] Moreover, the imperial *divan* dealt with the least to the most important cases. What differentiates the imperial *divan* as a court of justice from other *shari'a* courts is that specific cases could only be brought before the *divan* and not the *qadi*'s court. Only the *divan* could deal with cases that were politically sensitive[352] or cases with claims that exceeded a stipulated amount of money.[353] Qadis, members of the imperial learned hierarchy,[354] foreigners,[355] members of the military class,[356] or members of the sultan's administration could only be tried before the *divan*. Moreover, there were certain cases of non-Muslims that could not be dealt with by the *qadi* courts and had to appear before the *divan*. Such cases included the accusations brought against the Jews of ritual murders, heresy, apostasy of Muslims, and other cases that also included the Christian community.[357] In the cases regarding non-Muslim foreigners, the treaty of Capitulations of 1535 between the Ottoman Empire and France dictated that a French consul or ambassador would be the one who tries French

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[349] Inalcik, *The Ottoman Empire: The Classical Age,* p. 89 and Rapoport, "Royal Justice and Religious Law," p. 82.
[350] Van Den Boogert, Maurits H. *The Capitulations and The Ottoman Legal System*. Leiden: Brill, 2005, p. 47; see also Heyd, *Studies in old Ottoman Criminal Law*, p. 225 and Lybyer, *The Government of the Ottoman Empire,* p. 188.
[351] Heyd, *Studies in old Ottoman Criminal Law*, p. 225.
[352] Gilles, "Religious Institutions;" for instance, cases of heretics.
[353] Boogert, *The Capitulations and The Ottoman Legal System*, p. 49.
[354] Heyd, *Studies in old Ottoman Criminal Law*, p. 221-2.
[355] Peters, Rudolph. *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*. Cambridge: Cambridge University Press, 2005, p. 78.
[356] Imber, *Ebu's-Su'ud*, p. 77.
[357] Heyd, *Old Ottoman Criminal Law*, p. 223.

subjects.[358] However, if a foreign subject was tried before the *divan*, a diplomatic representative had to be present.[359]

A principle that the Ottoman *divan* held in common with the earlier *mazalim* courts was that anyone could bring his case before the *divan* or submit his grievance in form of a petition, no matter how minor.[360] The *divan* had thus begun to function as a mechanism of justice that served as a platform for public audience.[361] Members of the *divan* often met to hear out the grievances of the people and rectify the injustices caused against them.[362] The state's subjects utilized this institution of petitioning to complain against the abuses committed by other individuals, executive officials, tax collectors, *qadis*, or governors.[363] In theory, the petitions were addressed to the sultan. However, in reality, they were dealt with by the imperial *divan* as a whole on behalf of the sultan or by the grand *Vizier* in his place of residence.[364] Petitions were submitted by either sending a courier to Istanbul or through a *qadi* who would draw up a letter of grievance to the sultan.[365] In case the dispute was urgent, the *qadi* would send a spokesman to Istanbul. In some instances, the plaintiff or petitioner would submit the case himself before the *divan*.[366] This system of appeal or petitioning was one of the vital functions of the imperial *divan* and there was a lot of emphasis that was placed on it.[367] As mentioned

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[358] Heyd, *Old Ottoman Criminal Law*, p. 223.
[359] Peters, *Crime and Punishment in Islamic Law*, p. 78.
[360] Heyd, *Old Ottoman Criminal Law*, p. 226 and Rapoport, "Royal Justice and Religious Law," p. 81, 85; see also Inalcik, "State, Sovereignty and Law," p. 61.
[361] Pal. "Sultan, Imperial *Divan*, Grand Vizier," p. 71.
[362] Inalcik, *The Ottoman Empire: The Classical Age,* p. 89.
[363] Baldwin, James. "Petitioning the Sultan in Ottoman Egypt." School of Oriental and African Studies, Bulletin of SOAS, 75, 3 (2012), p. 499; Inalcik, "State, Sovereignty and Law," p. 61; Inalcik, *The Ottoman Empire: The Classical Age,* p. 91.
[364] Baldwin, "Petitioning the Sultan in Ottoman Egypt," p. 510 and Imber, "Government, Administration and Law," p. 225.
[365] Baldwin, "Petitioning the Sultan in Ottoman Egypt," p. 511.
[366] Inalcik, *The Ottoman Empire: The Classical Age,* p. 91.
[367] Inalcik, *The Ottoman Empire: The Classical Age,* p. 91.

earlier, there was the idealized image of the sultan personally listening to his subjects' grievances and publicly dispensing justice; however, over the centuries, the institution of petitioning grew more and more bureaucratized with a specific process of petitioning and a record-keeping system.[368] By the 17th Century, there was an archival register—Registers of Complaints (*Şikayet Defterleri*)—that was dedicated to recording copies of the *divan*'s responses to petitions and other imperial matters. It is argued that the emphasis on creating such a bureaucratic system for petitioning was a response to the growing number of petitions submitted to the *divan* over the years and the growing likelihood of the palace to be more attentive to the grievances of the public. However, what is mostly made available is the end process of responding to petitions, and not the course of action that was taken to produce a response. Some petitions survive in the Department of Complaints (*Şikayet Kalemi*), which was created in the 18th Century as a more improved record-keeping system of the *divan*'s responses to petitions and the further emphasis that was placed on their importance.

Those bureaucratic reforms, serving as one of the main functions of the imperial *divan*, showcase a momentous aspect of the core-periphery relations: how the state, through undertaking such measures to create such a system, became more engaged in the social scene, as well as how the public began to view the government. It could be contended here that the subjects regarded petitioning the *divan* as a system that could yield results and have an impact in changing a given situation, no matter how trivial.[369] The question that remains here is why, given the increase in the number of *shari'a* courts

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[368] Baldwin, "Petitioning the Sultan in Ottoman Egypt," p. 503.

[369] A case that Baldwin cites (499) shows how even the insignificant cases were brought before the *divan*. In 1743, a Muslim resident sent a petition complaining of his Christian resident—in his neighborhood in the Muslim quarter—who had built his house a level taller than other houses, which violated the local custom.

throughout the provinces of the Ottoman Empire, some chose to turn to petitioning the *divan* rather than appealing before the local *qadi*, even though "sending a petition to Istanbul would have involved significant investment of money and time."[370] Moreover, in some cases, the *divan* referred the case to the provincial *qadi* or governor.[371] One angle that could be considered here is that in some cases the petition was an appeal against a sentence passed by a *qadi*. Peters contends that, despite the lack of an official system of appeal having existed in the Ottoman legal administration, there was still room for capital punishments to be reevaluated by the sultan or the *divan* if a petition is submitted before the sentence is administered.[372] A firman is thus issued in case the appeal is accepted, delegating an investigator to review the case and request a retrial or pass a new sentence. The *qadi*'s or governor's sentence could be revoked on the grounds that either the official accepted a bribe to inflict a certain sentence or the sentence was passed on the basis of a false testimony.[373] In other cases, a lawsuit or a petition was sent to the same court for a retrial or to another court in the same district if the appeal made was against the local *qadi*.[374] Another possible reason for why people chose to go through the trouble of petitioning the *divan* was that the *divan*'s response to the petition often gave specific instructions for the *qadi* to follow and had the ability to largely impact a trial before the local court.[375] A third reason that James Baldwin advances here is that many petitioners aimed at collecting a large number of authoritative documents to strengthen their

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[370] Baldwin, "Petitioning the Sultan in Ottoman Egypt," p. 511.
[371] Ibid.
[372] Peters, *Crime and Punishment in Islamic Law*, p. 91-92.
[373] Peters, *Crime and Punishment in Islamic Law*, p. 92.
[374] Inalcik, *The Ottoman Empire: The Classical Age,* p. 91.
[375] Baldwin, "Petitioning the Sultan in Ottoman Egypt," p. 511.

position. Thus, they would obtain a fatwa, register their case in a *shari'a* court, acquire a decree issued by the *divan*, or secure an order by the local governor.[376]

However, though anyone could bring his case before the *divan*, the fact that the process of petitioning required not only time and effort but also money meant that there was a degree of limited accessibility to the *divan*.[377] Moreover, Inalcik argues that, "justice and security were greatest in the regions nearest the capital,"[378] seeing as that the *divan* was more accessible to those who lived near Istanbul and did not take too long to reach it. However, it could be concluded here that the *divan* did indeed address the subjects' grievances and aimed at removing injustices or abuses committed against them. This could to an extent reveal something about the legal system of administration, even if it at times fell short of justice.

Those developments resulted in the imperial *divan* becoming more and more of a bureaucracy and a "decision making entity" that exercised administrative and legal authority on the sultan's behalf.[379] With the degree of authority and prestige vested in members of the *divan*, the sultan's representatives appropriated political power and wealth. They answered only to the sultan and he alone could pronounce sentences against them in matters retaining to the public.[380] A case in 1596 calling for the trial of the *defterdar* who was accused of accepting bribes was rejected on the premise that "the chief *defterdar* acts on the sultan's authority and is director of the Treasury in the sultan's name. To date there has never been an inquiry into this office."[381]

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[376] Baldwin, "Petitioning the Sultan in Ottoman Egypt," p. 516.
[377] Boogert, *The Capitulations and The Ottoman Legal System*, p. 48.
[378] Inalcik, *The Ottoman Empire: The Classical Age,* p. 91.
[379] Pal. "Sultan, Imperial *Divan*, Grand Vizier," p. 72.
[380] Inalcik, *The Ottoman Empire: The Classical Age,* p. 93.
[381] Ibid., p. 94.

CHAPTER 3: THE JUDICIARY

As previous chapters have shown, there were some significant historical developments that unfolded after the Ottoman conquests in the 15th and 16th Centuries. Perhaps the most important of those developments were made in regards to the imperial learned hierarchy, which saw the rise of a judicial class that was distinctly different from those of other Muslim state structures. The Ottoman judiciary came to constitute an integral part in the bureaucratic structure of the state, with the *mufti* (jurisconsult) and the *qadi* (judge) as its centerpieces. The developments of the Ottoman legal system must be in part attributed to the role the *muftis*—particularly the *seyhulislam*—and the *qadis* played in the bureaucratization of the state's administration. In theory, the importance of both those figures lied in their embodiment of religious practices and traditions.[382] As one was responsible for the interpretation of Islamic law, and the other responsible for the application of it, the *mufti*'s and the *qadi*'s roles were idealized for their sacred functions.[383] However, by the 16th Century their offices grew more politicized and came to represent some of the innovations of the Ottoman legal practices. It is thus interesting to see the developments of those offices and how the *mufti* and *qadi* served as a crucial linking point between the state and society and between the "transcendent and mundane."[384]

[382] Reinhart, A. Kevin. "Transcendence and Social Practice: *Muftis* and *Qadis* as Religious Interpreters," in *Islamic Political Thought and Governance: Critical Concepts in Political Science, Volume III.* Eds. Abdullah Saeed. New York: Routledge, 2011, p. 326.
[383] Pixley, Michael M. "The Development and Role of the Seyhulislam in Early Ottoman History." *Journal of the American Oriental Society*, Vol. 96, No. 1 (1976): 89.
[384] Reinhart, "Transcendence and Social Practice," p. 339.

I. The *Seyhulislam* (The Mufti of Istanbul)

This section deals with the role the office of the *Mufti* of Istanbul played in the evolution and development of the Ottoman judicial hierarchy. It is primarily concerned with how the position developed from relative ambiguity to becoming one of the most prestigious and powerful positions in the Ottoman legal administration by the 16th Century. With the rise of an imperial learned hierarchy serving as a backdrop to the transformation of the office of muftiship,[385] it is first important to trace back how the institution of muftiship was viewed with relative independence and how it functioned in the classical legal terms in the pre-Ottoman period. Furthermore, it is also interesting to see the role the institution of the *seyhulislam* realized in widening the Islamic legal discourse and serving to reconcile the secular elements of the Ottoman legal practice with the *shari'a* legal theory.

Before pondering on the transformations that the institution of muftiship endured from pre-Ottoman to post-Ottoman, it is essential to grasp the classical concept of a *mufti* and his *fatwa* (*Fetva* in Turkish), with issuing *fatwas* based on the *shari'a* as his chief function. With the necessary religious qualifications, a *mufti* exercised the authority to issue a *fatwa* within the scope of the *shari'a* as an answer to a question presented to him.[386] Serving as the *qadi*'s counterpart in the Islamic legal system, the capacity that the *mufti* held was nonetheless fundamentally different from that of the *qadi*'s. There are a number of differences that could be highlighted here. Firstly, although *fatwas* are authoritative sources of law, they are however not binding legal statements; unlike a

[385] Burak, Guy. *The Second Formation of Islamic Law: The Hanafi School in the Early Modern Ottoman Empire*. Cambridge: Cambridge University Press, 2015, p. 23.
[386] Ibid., 24.

qadi's judgment that is both binding and irrevocable.[387] Secondly, a *qadi's* ruling is effective only in a given case, while a *mufti*'s *fatwa* becomes an authoritative statement of law that would still serve as valid for consultation in other cases.[388] Thirdly, *qadis* primarily tackle disputes either between the subjects or between the subject and the state, while a *mufti* deals with a wider range of concerns that vary from obscure matters to questions regarding religious practices.[389] Fourthly, the *qadi*'s appointment was a prerogative of the sultan, whereas the *mufti* enjoyed a fair degree of independence in classical legal practice from the state authorities.[390] Finally, a *mufti*, by virtue of his role in interpreting the Islamic legal doctrine and extending his interpretations to be administered in new cases, is considered a *mujtahid* ("a performer of independent legal discretion"), while a *qadi* is regarded as a *muqallid*.[391] However, Burak argues that in the Hanafi legal doctrine, there was also a *mufti* who was considered a *muqallid*.[392]

Highlighting those differences serves in articulating the capacity fulfilled by the *mufti* in the judicial system in relation to the *qadi*. Furthermore, placing the *mufti* within the right historical and legal context aids in understanding how he came to constitute part of the *qadi*'s court's legal proceedings. Even though a *mufti*'s legal opinion is not a binding statement of law and is thus not enforceable, a *qadi* may seek legal advice from him in regards to a specific case to clarify a legal point and base his sentence on his *fatwa*.[393] Moreover, litigants often consulted the *fatwas* of *muftis* and presented them

[387] Imber, Colin. *Ebu's-Su'ud: The Islamic Legal Tradition*. Stanford, CA: Stanford University Press, 1997, p.7.
[388] Imber, *Ebu's-Su'ud*, p.7.
[389] Burak, *The Second Formation of Islamic Law*, p. 24.
[390] Ibid.
[391] Ibid., 25.
[392] Ibid.
[393] Imber, *Ebu's-Su'ud*, p.7.

before the court to strengthen their position.[394] Even though the *qadi* was not obligated to administer a *fatwa*—whereas it was neither required nor rejected by the court—it came to constitute an integral element in the court proceedings.[395] According to Gerber's study of thousands of Bursa court records from the 17th Century, all litigants who presented a *fatwas* in court won their cases.[396] Gerber argues that the reason behind litigants with *fatwas* winning their cases is that *muftis* did not issue their *fatwas* without spending sufficient time deliberating a case at hand.[397] Furthermore, hundreds of court records were found to have cited *fatwas*; however, the eminence of the *fatwa* in the adjudication process of the court came later under the Ottomans. Nonetheless, despite being renowned as an important source for judicial authority, a *mufti* did not exercise the same power or stature a *qadi* did. There was no hierarchy of *muftis* that existed the same way it had for the qadis and *muftis* did not hold any official status.[398] They were appealed to for their religious knowledge and not for being enforcers of the law.[399] However, by the 15th Century, with the emergence of an imperial learned hierarchy came the unprecedented institutionalization of the muftiship and the rise of the office of *seyhulislam*. To fully grasp the extent of this transformation, a brief comparison will be made to the institution of muftiship during the later period of the Mamluk's reign.

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[394] Hathaway, Jane and Karl K. Barbir. *The Arab Lands Under Ottoman Rule, 1516-1800.* London: Pearson PLC, 2008, p. 120.
[395] Tucker, Judith E. *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine*. Cairo: The American University in Cairo Press, 1999, p. 36.
[396] Gerber, Haim. *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective*. Albany: State University of New York Press, 1994, p. 81.
[397] Gerber, *State, Society, and Law*, p. 82.
[398] Imber, *Ebu's-Su'ud*, p.7.
[399] Pierce, Leslie. *Morality Tales: Law and Gender in the Ottoman Court of Aintab*. Berkley: University of California Press, 2003, p. 115.

Muftiship: From Mamluk to Ottoman and the Evolution of the **Seyhulislm**

Burak gives an interesting account of the institution of muftiship in the late Mamluk sultanate and examines the "intense encounter" between the ideals and understandings of the pre-Ottoman institution and between the new perceptions and the reconstructed form of this institution under the Ottomans.[400] A reading of this transformative juncture serves as a compelling point of departure for this section wherein it crystalizes the degree of the accomplishments in the state's bureaucracy the Ottomans had reached by the 16th Century. As previously mentioned, *qadis* were appointed by the sultan whereas *muftis* were not; they exercised the issuance of *fatwas* independently of the state's authority. This was true to the reign of the Mamluks.[401] How then did *muftis* gain their credibility of being commanding sources of judicial authority? It was the prevailing tradition during the Mamluk period and even earlier for jurists and scholars to travel in the quest for knowledge to learning centers inside and outside the bounds of the Mamluk sultanate. A jurist was then often granted a permit by his teacher, which made him a *mufti* and allowed him to teach law and issue *fatwas*.[402] Granting a permit became an important element in the institutionalization of the *mufti*, which was conferred on the student at some point during his training career. Gaining the certificate to teach and issue *fatwas* was necessary for holding offices, such as becoming a judge or a professor at a *madrasa*.[403] Anyone who was granted a permit held the prerogative of issuing a *fatwa*, whether or not they

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[400] Burak, *The Second Formation of Islamic Law*, p. 23.
[401] Ibid., 22.
[402] Ibid., 26.
[403] Ibid., 27-28.

occupied a teaching or judicial position. However, only jurists and scholars were entitled to this permit.[404]

Muftis did not hold an administrative position during the Mamluks, but *qadis* did. However, what is interesting here that becomes later fundamentally different from Ottoman legal practices is that the differences between a *mufti* and a judge were not very clear-cut. A state appointed judge or deputy judge—having been granted a permit—also exercised the authority of issuing a *fatwa*. Yet, *qadis* held official administrative offices while *muftis* did not.[405] Nonetheless, only the *mufti* of the Mamluk *Dar al'Adl* held an official position; even so, his functions were limited to that of a regular *mufti* with his *fatwas* neither being enforceable nor holding the power to revoke a *qadi*'s sentence.[406] Seeing as that holding a permit supplied any jurist or scholar with the authority of issuing *fatwas*, not all of the *muftis* necessarily held the sufficient or proper knowledge to do so. In order to curtail some of the fluidity that existed in the institution of muftiship, the Mamlulk Sultan al-Zahir Barquq by the end of the 14th Century issued an edict restricting the *muftis* to abide by their schools of law and declared that it was the duty of the chief *qadis* of each school to grant permits to the *muftis* to issue *fatwas* in accordance to their respective schools.[407] This depicts that there were some early attempts to standardize the issuance of *fatwas* and to a degree limit the number of individuals who could issue them. It also shows that the "multiplicity" of *muftis* must have been a predicament to some extent.[408] However, Burak argues that despite the attempts made by the Mamluk sultan,

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[404] Burak, *The Second Formation of Islamic Law*, p. 28.
[405] Ibid., 29.
[406] Ibid., 30.
[407] Ibid., 31.
[408] Ibid.

the supervision of *muftis* still fell under the jurisdiction of the jurists and it was not an administrative matter to deal with.[409]

Despite not having a hierarchy that paralleled that of the *qadis'* there was an unofficial hierarchy that began to appear, which saw the rise in prominence of certain *muftis* over others. Yet, there was still not a coherent institution or a standardized system that regulated the *muftis*. This is again shown in the problem the multiplicity of jurisconsults occasioned in regards to the different opinions that existed amongst *muftis* of different schools or within the same school. There were no guiding principles or a hierarchal authority to turn to in order to settle the "constant dispute and strife" amongst *muftis*.[410] This lack of homogeneity and uniformity may have served as a prelude to the "intense encounter" mentioned earlier between the Mamluk model of muftiship and the Ottoman model. Even though some of the Mamluk jurisconsult practices did indeed prevail well after the Ottoman conquests of Cairo and Damascus in the 16th Century, there was a significant change that took place in the provinces.[411] The granting of permits, despite not being eradicated completely after the conquests, had decreased dramatically and no longer retained its previous value. Burak affiliates part of this decline with *muftis* being granted official appointments in Damascus under the Ottomans.[412]

By the mid-15th Century, the institution of muftiship began to witness fundamental changes to its structure under the Ottoman rule. With the rise of the imperial learned hierarchy and the Ottoman authorities' regulation of the Hanafi doctrine, as well as the creation of a specific form of Ottoman "Hanafism," the office of the *seyhulislam*

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[409] Burak, *The Second Formation of Islamic Law*, p. 31.
[410] Ibid., 33.
[411] Ibid., 35.
[412] Ibid., 36.

transpired by the 16th Century to become the head of the entire judicial institution.[413] The emergence of this office prompted a series of significant political and administrative changes that succeeded in the integration of the religious hierarchy into the bureaucratic structure of the state.[414] Seeing as that the rise of the Ottoman *seyhulislam* is reckoned to be one of the most foundational developments and innovations of the 16th Century Ottoman administration, the focus here will be primarily on examining the nature of the relationship that developed between the *seyhulislam* and the state—or the sultan for that matter—and how the *seyhulislam* grew more and more politicized. However, before proceeding with appreciating the dynamic reconfiguration of this office and how it came to be perceived, it is important to first grasp the shift from the Mamluk model to the Ottoman model to understand more clearly the changes that were brought about in the office of muftiship.

The hierarchy of *muftis* was made up of the *seyhulislam*—the *Mufti* of Istanbul—and below him in rank were the provincial *muftis*. One of the reasons they were considered to be lower in rank is that the state-appointed provincial *muftis*, unlike the *seyhulislam*, were obliged to cite the authoritative texts they turned to in their *fatwas* by order of the sultan.[415] Moreover, one way of introducing change to the institution of muftiship was appointing official *muftis* to the provinces. The motivation behind those appointments was in part to extend the accessibility to subjects of *muftis* with authoritative opinions.[416] Prior to the designation of provincial *muftis*, the subjects had to

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[413] Burak, *The Second Formation of Islamic Law*, p. 39.
[414] Bulliet, Richard W. "The Shaikh Al-Islam and the Evolution of Islamic Society." *Studia Islamica*, No. 35 (1972): 53.
[415] Burak, *The Second Formation of Islamic Law*, p. 40; Heyd, Uriel. "Some Aspects of the Ottoman Fetva." *Bulletin of the School of Oriental and African Studies, University of London,* Vol. 32, No. 1 (1969): 44-5
[416] Burak, *The Second Formation of Islamic Law*, p. 40.

either send their inquiries to the *mufti* in Istanbul or to travel to the capital themselves.[417] Furthermore, one of the chief functions of appointing *muftis* to the provinces was to oversee the activities of officials and judges and to ensure that there was no oppression taking place as well as that they were abiding by the *shari'a* regulations.[418] In regards to the appointment deed itself, the state authorities appointed *muftis* "from among the professors or from among the pious who were capable of issuing legal opinions."[419] There was an association between the rise of the imperial madrasa system and the appointment of provincial *muftis*. It was often the case that teachers in important madrasas established by the sultans were appointed as provincial *muftis*. There was also a correlation between appointing *muftis* from the more important madrasas to holding the office in major cities. According to Burak, "the attachment of the office of the *mufti* to a prominent provincial madrasa characterizes mostly large urban centers."[420] That created a form of hierarchy that existed amongst *muftis* in the provinces; their salaries were one indication of the emergence of this hierarchy where salaries ranged from 40 *akçes* to 100 *akçes* a day.[421] Another aspect of this correlation was the fact that this could have been one attempt to "Ottomanize" the institution of the muftiship through reinforcing the position of the Hanafi *mufti* seeing as that, "the joint post [of *mufti* and teacher] passed at least temporarily from the hands of local scholars into those of Ottoman scholars."[422] Even though the position of *muftis* constituted an official post in the Ottoman administration, their hierarchy and career and training tracks were not fully developed

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[417] Burak, *The Second Formation of Islamic Law*, p. 40.
[418] Ibid.
[419] Ibid.
[420] Ibid., 41.
[421] Repp, Richard C. *The Mufti* of Istanbul: A Study in the Development of the Ottoman Learned Hierarchy. London: Ithaca Press, 1986, p. 66 and Burak, *The Second Formation of Islamic Law*, p. 41.
[422] Repp, *The Mufti of Istanbul,* p. 68.

like that of the *qadis'* or *muderris'*,[423] the appointments by the central government of provincial *muftis* created a distinction and a division of functions between judges and *muftis*, which also curtailed the "fluididity" that existed in the pre-ottoman institution of muftiship where almost anyone with a permit could issue *fatwas*. Moreover, perhaps this was one of creating a standardized judicial authority that limited who the subjects could turn to for legal opinions and also the "form" of rulings dispensed, as well as tying the provincial subjects more and more to the capital in a more cohesive manner.

Despite the emphasis Repp places on what he calls "the second class of *mufti*,"—which follows the class of *seyhulislam*—there is a much richer literature that exists on the office of *seyhulislam* in contrast to that of the provinces.[424] The emergence of the office of *seyhulislam* in the mid-15th Century did not see the instant crystallization of the office as it had in the 16th Century. One motive for the early appointment of *seyhulislam* lied in the growing need to create an image of religiosity of the state and to establish it within the "Islamic realm." Another was, according to Michael M. Pixley, to subvert the power of the sultan's opponents.[425] As mentioned in the previous chapter, the office of *seyhulislam* was one way to counter the government's secular character by placing a symbolic religious figure. It is argued that the *seyhulislam* retained the same "symbolic" image as that of the Abbasid Caliphs in Mamluk Cairo. However, the capacity that the *seyhulislam* grew to fulfill shows that the office was fundamentally different from that of the Caliph's. He represented an institution that later became highly involved in state

[423] Repp, *The Mufti of Istanbul,* p. 63.
[424] What is interesting about the emergence of the *seyhulislam* is that he rose out of the hierarchy of *qadiship* and not *muftiship*, where he often served as *qadi* of a major city and later as *kadi'-'asker* before becoming *seyhulislam*. Pixley, "The Development and Role of the Seyhulislam," p. 90. and Gerber, *State, Society, and Law*, p. 85.
[425] Pixley, "The Development and Role of the Seyhulislam," p. 92.

affairs.[426] Moreover, according to the *kanunname* of Mehmed II which marked a major development in the office of *seyhulislam*, the functions of the office were described along with the status that the *seyhulislam* was to retain—which placed the position of the *seyhulislam* on the same grade as that of the grand vezir's and entailed that the office was to hold even more respect. [427]

Seeing as that the *seyhulislam* was meant to employ a religious status in the Ottoman government away from "worldly" things, he in theory was not meant to receive a salary.[428] However, the first *seyhulislam* was said to have received a salary of 30 *akce* per day while the *kadi-'asker* received 500 *akce* daily. This, Pixley argues, "underscores the low profile of the *seyhulislam*" in the early 15th Century.[429] However, the nature of the office of *seyhulislam* drastically changed from the 15th to the 16th Century in terms of perceptions: how they and other viewed them. Repp puts forward an interesting theory in this regard. He contends that in the 15th Century, when the office was still not fully developed, a scholar was more concerned with attaining "excellence in *'ilm*," whereas by the 17th Century, a scholar's success was linked to the status of his rank and salary.[430] To what extent this was true could be contested; however, it is safe to say that by the 16th Century the office of the *seyhulislam* shifted towards a more "politicized nature" and held more prerogatives that entitled them to more authority.

Some of the functions that became attached to the office by the 16th Century involved tending to the state's administrative needs. The *seyhulislam* was incorporated in

[426] Bulliet, "The Shaikh Al-Islam and the Evolution of Islamic Society," p. 54; see also Pixley, "The Development and Role of the Seyhulislam," p. 93.
[427] Inalcik, Halil. *The Ottoman Empire: The Classical Age 1300-1600*. Translated by Norman Itzkowitz and Colin Imber, New York: Praeger Publishers, 1973, p. 172.
[428] Inalcik, Halil. *The Ottoman Empire: The Classical Age*, p. 172.
[429] Pixley, "The Development and Role of the Seyhulislam," p. 92.
[430] Repp, *The Mufti of Istanbul,* p. 28.

the decisions made in regards to the conduct of government and public policy.[431] This was born out of the relationship that flourished between the *seyhulislam* and the sultan. Before making important decisions, the sultan often consulted the *seyhulislam* and the grand vezir—heads of the religious and administrative authorities.[432] The sultan also frequently turned to the *seyhulislam* if he wished to alter something in legal policy.[433] By the 16th Century, the *fatwa* of the chief *mufti* was one aspect of this relationship. Pixley distinguishes between two types of *fatwas*: those involved in administrative affairs and those that are concerned with the public.[434] The strength of the *seyhulislam*'s *fatwa* played an important role in undermining the authority of the *qadi*. When it came to the issue of differences of opinions amongst jurists, Ebu's-su'ud's suggestion to the sultan was, "to ensure that the individual [qadi] is…not permitted freely to choose whose opinion he will follow, but obliges to adjudicate in accordance with the sultan's directives."[435] Those sultanic decrees were often promulgated on the initiative of the *seyhulislam*. If he wished to alter a point of law, the *seyhulislam* petitioned the sultan to issue a decree that would be binding on the qadis to enforce in their courts.[436] This shows to what extent the *seyhulislam*'s office grew more attached to the sultan and, despite not being enforcers of the law, could affect what and how Islamic law was applied in the *qadi*'s court.

The nature of this relationship developed by the early 16th Century when Ali Cemali was *seyhulislam*. His period in office witnessed the three reigns of Bayzeid II,

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431 Pierce, *Morality* Tales, p. 109; see also Repp, *The Mufti of Istanbul,* p. 215.
432 Inalcik, *The Ottoman Empire: The Classical Age*, p. 93.
433 Gerber, *State, Society, and* Law, p. 95.
434 Pixley, "The Development and Role of the Seyhulislam," p. 91.
435 Hoexter, Miriam. "*Qadi*, *Mufti* and Ruler: Their Roles in The Development of Islamic Law," *in Law, Custom and Statue in the Muslim World.* Ed. by Ron Shaham. Boston: Brill, 2007, p. 79.
436 Imber, *Ebu's-Su'ud*, p.7.

Selim I, and Suleyman I.[437] It was his encounters with Selim I that are worth noting here. When Ali Cemali heard that Selim I had ordered the execution of 150 treasury officials without clear evidence that establishes their offence, he went uninvited to the council to meet the sultan and told him that, "The duty of the [*seyhulislam*] is to watch over the after-life of the sultan. I have heard that you have ordered the executing of 150 men, the execution of whom is not lawful under the *shari'a*. You must pardon them."[438] Enraged, the sultan answered that it was not Ali Cemali's position to interfere with the state affairs. However persistent, Ali Cemali insisted that he was interfering with the after-life of the sultan who will suffer greatly if he does not pardon them. Eventually, the sultan agreed to pardon them.[439] In another case, Ali Cemali saved again another 400 silk merchants from execution by order of Selim I, once again under the rationalization of saving the sultan from the punishment of the after-life. When he calmed down, Selim I ordered the appointment of the two posts of the *kadi-'askers*; however, Ali Cemali refused on the basis that, "he had sworn an oath to God never to let the word *hakamtu* pass his lips."[440] Those two stories showcase the *seyhulislam*'s growing influence over the sultan. Even though the early 16th Century the institution of the *seyhulislam* had not yet witnessed its peak of development, there were more responsibilities being attached to it.

As mentioned earlier, with the *seyhulsilam* being more involved with the sultan, the latter began to incorporate the former in matters of public policy. The *seyhulislam* was used as a tool to legalize certain actions by the state affecting its internal and external affairs. For instance, before launching the military campaigns against the Mamluks,

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[437] Repp, *The Mufti of Istanbul,* p. 210-11.
[438] Ibid., 211.
[439] Ibid.
[440] Ibid., 211-12.

Selim I "put three questions to Ali Cemali who, in his answers to them, gave a legal basis for the projected campaign;"[441] thus, providing the sultan with sufficient religious grounds to proceed with the conquests. This was not the only case where certain administrative actions were based on the opinions of the religious scholars or the *seyhulislam* in particular for justifications. Suleyman I's campaign against the safavids was said to have been advocated by Kemalpaşazade[442]—one of the renowned 16th Century *seyhulislams*. Another example that serves this point is when the *fatwa* of Ebu's-su'ud was sought out by the sultan to justify breaking the treaty with Venice in which the Ottomans seized Cyprus, despite the lack of consent amongst most vezirs.[443]

The office of *seyhulislam* reached its height with Ebu's-su'ud (1543-1574)[444]—the most celebrated and distinguished *seyhulislam* in Ottoman history. A fitting description that serves as the prologue of Ebu's-su'ud's time as *seyhulislam* is cited in Imber: "the office of *Mufti* was troubled and passing from hand to hand. The roof of its house was unsupported, until its destiny was delivered to [Ebu's-su'ud] and its keys handed over [to him]."[445] There was a total of seven *seyhulislams* in the 16th Century starting with Ali Cemali and up to Ebu's-su'ud.[446] After the death of Kemalpaşazade who held office for 11 years, there were four other chief *muftis* before Ebu's-su'ud. The four of them held office for a short period (the first held it for 5 years, the second held it for 4

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[441] Repp, *The Mufti of Istanbul,* p. 212.
[442] Ibid., 238.
[443] Fleet, Kate, "Ottoman Expansion in the Mediterranean," in *The Cambridge History of Turkey,* 2: *The Ottoman Empire as a World Power, 1453-1603*. Eds. Suraiya N. Faroqhi and Kate Fleet. New York: Cambridge University Press, 2013, p. 166-7.
[444] Pixley, "The Development and Role of the Seyhulislam," p. 95; It was the longest time any *seyhulislam* had held office for.
[445] Imber, *Ebu's-Su'ud*, p. 13.
[446] Repp, *The Mufti of Istanbul,* Chapter V.

years until his dismissal, the third for 1 year, and the fourth for 2 years).[447] This was an indication that the office before Ebu's-su'ud underwent a troubled phase and was to a degree weakened by the turnover. One aspect of this was that in theory, the chief *muftis* held tenure and were not prone to dismissals. However, the 16th Century witnessed the first dismissal of the *seyhulislam*—some were even executed later in the 17th Century.[448]

With the emergence of Ebu's-su'ud as *seyhulislam*, the office gained a lot of prerogatives, power, and prestige. There are a number of main developments in the office that are associated with Ebu's-su'ud that elucidate to what extent it had changed and are of relevance here. The most nominal of which are his many attempts to reconcile the *shari'a* with the *kanun* and his involvement in policy making (this is further discussed in the next subsection). When it comes to decision-making, Ebu's-su'ud grew more drawn to the political realm of the state more than the religious. He is most known for his efforts in extending the doctrine of the *shari'a* to fit the innovations introduced by the Ottoman authorities in several aspects of the state's administration.[449] The famous *Maruzat* of Ebu's-su'ud—the 'Matters' submitted by him to Suleyman I—offer an important link between the *seyhulislam* and the sultan. It showcases the extent of Ebu's-su'ud's intervention in administrative matters of the state wherein he would issue a *fatwa* regarding a legal problem and petitions the sultan to endorse it, who in turn does so and decrees a firman that is thus sent out to *qadis* and governors to enforce it.[450] Furthermore, what is noteworthy about the *Maruzat fatwa* collections is that it cites a lot of the *kanun*

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[447] Imber, *Ebu's-Su'ud*, p. 13.
[448] Pixley, "The Development and Role of the Seyhulislam," p. 94; Burak, *The Second Formation of Islamic Law*, p. 46-7.
[449] Examples of this are discussed in the next subsection.
[450] Heyd, Uriel. *Studies in old Ottoman Criminal Law*. Ed. V.L. Menage. Oxford: Clarendon Press, 1973, p.183-4.

decrees of Suleyman I,[451] which shows to the willingness of the *seyhulislam* to issue opinions outside of the scope of the *shari'a*. He was no longer confined by the bounds of the *shari'a* doctrine, but became highly involved in the *kanun* as well. Some of the chapters in *fatwa* collections cover issues such as land or criminal laws that are not dealt with in the *shari'a*.[452] Seeing as that the *mufti* was regarded as a *mujtahid*, Ebu's-su'ud utilized "legal fictions" to find grounds in the *shari'a* for *kanun* innovations.[453] According to Heyd, the *seyhulislam* and other *muftis* became more "authorized" and inclined to issue *fatwas* in accordance to both the *shari'a* and *kanun*.[454] If the *seyhulislam* is asked a question in regards to an issue not dealt with in the *shari'a*, he issued a *fatwa* based on *kanun*.[455] One reason for this degree of acceptance of Ebu's-su'ud towards the *kanun* regulations is that prior to being *seyhulislam* he had served as *qadi* and *kadi-'asker* of Rumelia where he "followed" the *kanun* for a lengthy period of time so it was not apprehensible for him to deem *kanun* as illegal now that he became *seyhulislam*.[456] Another possible reason that Ebu's-su'ud had established in one of his rulings is that, "there can no decree of the Sultan ordering something that is illegal according to the *shari'a*."[457] Thus, the *kanun* could not have simply contradicted the *shari'a*. To what extent or it did not is the centerpoint of a lot of debate.

However, regardless here of the debate, Ebu's-su'ud must be credited for his efforts to systematize the law. There are a number of innovations that were introduced and legalized by Ebu's-su'ud that could be briefly mentioned here other than the ones

[451] Heyd, *Studies in old Ottoman Criminal Law*, p. 184.
[452] Ibid., 190.
[453] Ibid., 188.
[454] Ibid., 189.
[455] Ibid.,188.
[456] Ibid.
[457] Ibid., 192.

that will be expanded on below: legalization of fines, the statute of limitations, and the liability of blood-money. As previously mentioned in the chapter on Ottoman law-making, the *kanun* prescribed fines to a number of offences, which was a penalty that is outside of the scope of the *shari'a*. This dates back to the *kanunname* of Mehmed II; however, it is of importance here that Ebu's-su'ud legitimized the "fiscal" character of this penalty and even prescribed it in some of his *fatwas*. When asked if it was authorized for a judge or governor to impose a monetary fine, Ebu's-su'ud's response was: "I have heard from a reliable person that a money fine is permissible if the judge or governor sees fit. A case in point is when a man does not attend Friday prayer. It is permissible to punish him with a fine."[458] Moreover, the statute of limitation serves as another case wherein the sultan issued a decree on the initiative of a *fatwa* of Ebu's-su'ud. The sultanic decree enacted in 1550, fixed "an obligatory statute of limitation of ten years in all matters other than those pertaining to sown lands, in which the limit for filing suits was set at fifteen years."[459] This was, once again a change introduced on the basis of Ebu's-su'ud's *ijtiahd* wherein jurists before him have pondered over the matter for years and it had remained unresolved. In regards to the liability of blood-money, which was briefly discussed in the chapter on Ottoman law-making, the decree issued holding the occupant of a residence where a murder took place liable for blood-money was also based on the initiative of Ebu's-su'ud. Here, the *seyhulislam* requested that the sultan should adopt the opinion of Abu Yusuf over that of Abu Hanifa's who was of the opinion that the owner and not the occupant should be held liable.[460] Those cases serve to demonstrate the nature of the relationship between the *seyhulislam* and the sultan and to what extent

[458] Imber, *Ebu's-Su'ud*, p. 224-5.
[459] Gerber, *State, Society, and Law*, p. 91.
[460] Heyd, *Studies in old Ottoman Criminal Law*, p. 185.

the workings of both the former and the latter led to legitimized efforts to expand the legal doctrine to encompass Ottoman innovations.

Other forms of developments that were witnessed in the institutionalization of the office of *seyhulislam* during Ebu's-su'ud were the growth in his salary, the authority he gained in making judicial appointments,[461] and lastly, his contributions to the bureaucratization of the institution of *fatwa*.[462] As once stated, as a religious rather than a secular image, the *seyhulislam* was in theory not meant to receive a salary; however, Ali Cemali did receive a daily wage of 30 *akçes*, which was markedly less than that of the wage the *kadi-'asker* had received then. However, when Ebu's-su'ud assumed office, his daily wage rose to 600 *akçes* after the additions Suleyman I made to his salary.[463] Furthermore, besides the rise in his salary, Ebu's-su'ud also gained the authority of becoming involved in the appointments of the imperial learned hierarchy.[464] This was previously a prerogative of the *kadi-'askers* with the grand vezir or the sultan either confirming or rejecting them.[465] Pixley offers two explanations for this shift in the authority of judicial nominations; the first being that the grand vezir became preoccupied with more pressing matters than to go over the nominations, while the second is that this was an attempt to curb the power of the *kadi-'askers*.[466] Either way, those developments led to the *seyhulislam* assuming more power and prestige.

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[461] Repp, *The Mufti of Istanbul,* p. 278.
[462] Heyd, "Ottoman Fetva."
[463] Repp, *The Mufti of Istanbul,* p. 290-1.
[464] Ibid., 295.
[465] Pixley, "The Development and Role of the Seyhulislam," p. 95.
[466] Ibid.

The last development deserves some attention here.[467] The degree of evolution that the office of *seyhulislam* witnessed during Ebu's-su'ud is again discerned in the contributions that he made to the institution of the *fatwa*. According to Pierce, "the influence of his position was reflected in the exponential increase in the number of *fatwas* he issued and in the parallel elaboration of a *fatwa* office."[468] His predecessor, Ali Cemali, also known as "the basket man," used to have a small basket that he hung from his window where people used to put their questions on a piece of paper. He would then pull it back up when a petitioner pulled at the string, wrote down the answer on the same piece of paper and sent the basket back down.[469] Earlier in the 16th Century, the *fatwas* were issued and delivered personally by the *seyhulislam*. Nonetheless, when Ebu's-su'ud assumed office under the reign of Suleyman, the *seyhulislam*'s role grew to encompass more tasks and could no longer adequately meet the requirements of the increasing number of *fatwas*.

The average number of *fatwas* issued twice a week ranged from 300 to 400 *fatwas*. However, Ebu's-su'ud is known to have issued 1412 *fatwas* in one day and on another he had issued 1413 *fatwas*. This is not to be merely attributed to the *seyhulislam*'s degree of efficacy but rather to the growing bureaucratized nature of his office by mid-16th Century. The previous informal system of the issuance of *fatwas* that had existed before Ebu's-su'ud limited the number of *fatwas* that could be issued per day. However, the new setup of a department dealing specifically with the issuance of *fatwa* introduced by Ebu's-su'ud greatly bureaucratized the procedure in which *fatwas* were dispensed.

[467] Uriel Heyd's work, "Some Aspects of the Ottoman *Fetva,*" is one of the most prominent works on the development and bureaucratization of the institution of *fatwa*.
[468] Pierce, *Morality Tales*, p. 109.
[469] Ibid.

The institution began to heavily depend on highly trained clerks who would write a petitioner's question in the right format, which was again reexamined before being submitted to the *seyhulislam*. He would then write and sign his response and hand it to another clerk who would it pass it on to the questioner. The system involved even more clerks in the entire process from the question being first submitted to the response being handed out. This creation of the division of labor made for a highly efficient system of issuing *fatwas* that could meet the demands of the increasing numbers of questions coming in to the office of *seyhulislam*. Most times, the question was formulated in such a way that made the answer very clear wherein the *seyhulislam* answered simply with a yes or no.[470] However, the only times where the *seyhulislam* wrote the question and answer himself when it was in response to a question posed by either the sultan or a high government officials,[471] or when there was too much pressure of work.[472] The developments and innovations introduced to the *fatwa* institution are one aspect that showcase to what extent the office of *seyhulislam* had become highly bureaucratized and involved in the state structure.[473] It also depicts the emphasis placed on the *fatwa* and the strength that was attributed to it by the 16th Century. The fall of some sultans and grand vezirs came about on the basis of a *fatwa*. Sultan Ibrahim (1640-48) was deposed and executed on the strength of a *fatwa*.[474] The *fatwa* came to resemble a legal power that justified actions that were controversial in nature.

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[470] Imber, *Ebu's-Su'ud*, p. 14.
[471] Heyd, "Ottoman Fetva," p. 42.
[472] Imber, *Ebu's-Su'ud*, p. 57.
[473] By the 17th Century, according to Heyd, a fee was collected for a *fatwa*. Heyd, "Ottoman Fetva," p. 52-3.
[474] Inalcik, *The Ottoman Empire: The Classical Age,* p. 63-4, 98.

***Ebu's-su'ud's Attempts to Reconcile the* Kanun *with the* Shari'a*: The Cash* Waqf *Controversy and the* Mu'amalat**

Kemalpaşazade and Ebu's-su'ud were known for their efforts to reconcile the *kanun* with the *shari'a*. However, Ebu's-su'ud attempts at reconciliation were unparalleled. He is known for his many endeavors to bring Ottoman legal innovations into the workings of the *shari'a*. Jurists were often confronted with certain traditional practices that violated the Islamic doctrine. The response was to develop methodical opinions to create more coherent justifications for the unlawful practices.[475] This is exactly what Ebu's-su'ud did in regards to the issue of cash *waqf* to rest the controversy that stemmed from it.

Jon E. Mandaville put forward an interesting study that details the dynamics of the cash *waqf* controversy that unfolded in the 16th Century. The practice of cash *waqf* (*waqf al-nuqud*) meant, as Mandaville puts it, "The establishment of a trust with money the interest from which might pay the salary of a teacher, or a preacher, or even unashamedly pass into the pocket of the founder of the trust."[476] By the 15th Century, the practice of cash endowments was authorized in Ottoman courts despite jurists having condemned such practices that were unprecedented in the Islamic world.[477] The rationale that served to legalize the institution of cash *waqf* followed that it was the common practice in most of Anatolia and Rumeli. The earliest example saw the charging of a 10% annual interest from the lent cash in 1423. The number of cash *awqaf* in relation to land *awqaf* between the reign of Mehmed II and Murad II was relatively low. The argument was that so long as cash *waqf* took up a small percentage of the *awqaf* as a whole, there

[475] Pierce, *Morality Tales,* p. 237.
[476] Mandaville, Jon. "Usurious Piety: The Cash Waqf Controversy in the Ottoman Empire," IJMES, 10,3 (1979): 289.
[477] Mandaville, "Usurious Piety," p. 289 and Hoexter, "Qadi, Mufti and Ruler," p. 73.

was no real problem. However, cash *waqf* became the prevailing form of endowment by the 16th Century and the debate ensued among the jurists "long after there was any chance for a reversal of the practice."[478]

The whole debate was centered around the fact that waqf was meant to be a permanent form of endowment that did not diminish and had a perpetual character. However, Abu Yusuf and Muhammad al-Shaybani accepted the endowment of certain moveables but not cash.[479] Their permissibility was again established on the basis that this was the accepted practice (*ta'amul*) of the time. This concept of *ta'amul* was to be utilized and extended by the Ottomans in their reinforcement of the legal practice of cash *waqf*. The works of Ottoman scholars in support of the cash endowments in 15th Century cite the opinions of Abu Yusuf and al-Shaybani in regards to the legality of moveables. However, they explicitly kept out the fact that they did not approve of cash *awqaf*. This was a practice that had become embedded in the Ottoman legal procedures and was signed and accepted by the *seyhulislams* and *kadi-'askers*. It was unquestioned until in the 1540s the *kadi-'asker* of Rumeli, Çivizade,[480] ruled that he disagreed with the cash waqf practice. The debate erupted between the Islamic legal theory and the Ottoman legal practice and was to continue on to the next century. This is when the efforts of Ebu's-su'ud at reconciliation were most notable. He responded to the opinion issued by Çivizade with a *fatwa* legalizing the practice of cash waqf on the basis that it is "popular and generally practice," and that judges and governors have for long validated it. Thus,

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[478] Mandaville, "Usurious Piety," p. 292, 297.
[479] Ibid., 295.
[480] Mandaville, "Usurious Piety," p. 278. He had also served as a *seyhulislam* for two years, but was dismissed from office.

"the practice was perfectly sound and irrevocable."[481] In one of his *fatwas* found in his Maruzat, Ebu's-su'ud's ruling is seen as follows:[482]

> Q: Explain according to what *mezheb* is the cash *waqf* judged to be legal and irrevocable. Must the judgment be, first, that it is valid (*sihhatina*) and second, that it is irrevocable (*lazim*)?
> A: Judges are now authorized to rule thus.

Seeing as that Ebu's-su'ud's *fatwa*, despite being an authoritative source of law, is non-binding, it had to be supported by the strength of a sultanic decree. Thus, to end *ikhtilaf al-fuqaha'* over the controversy of cash *waqf*—and once again based on the initiative of the *seyhulislam*—Suleyman I issued a sultanic decree in 1548 formally legalizing the practice.[483] Additionally, Ebu's-su'ud wrote a 28-page essay serving as legal grounds for cash *waqf*.[484] It is important to note here that this was the common practice in the central provinces of the empire and was not practiced in the Arab provinces.[485]

Interest on loans—which was also connected to the practice of cash *waqf*[486]—was another problematic issue that became rather prevalent by the 16th Century. It served as yet another bone of contention between the *shari'a* legal doctrine and the Ottoman legal practice of *kanun*. In the Ottoman Criminal Code of Suleyman I, Article number 103 states that, "persons who make [loan] transactions in accordance with the *shari'a* shall not be allowed [to take] more than eleven for [every] ten [pieces of money lent]."[487] Accordingly, any rate that would exceed the 10% interest—which was

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481 Mandaville, "Usurious Piety," p. 297.
482 Ibid.
483 Hoexter, "Qadi, Mufti and Ruler," p. 78-9.
484 Mandaville, "Usurious Piety," p. 298.
485 Ibid., 308.
486 Hoexter, "Qadi, Mufti and Ruler," p. 72-3.
487 Heyd, *Old Ottoman Criminal Law*, p. 122.

supposedly meant to be in compliance with the *shari'a*—would be considered illegal.[488] Even though this was another sultanic decree based on the initiative of Ebu's-su'ud, the interest rates on loans during his term fluctuated between 5%-30%.[489] In the *shari'a* courts of Anatolia in the 17th Century, interests at 20% were the common accepted practice that was approved by both the judiciary and the sultan.[490] However, attempts were made to introduce the concept of *riba* in a more subtle expression so as to not be in clear violation with the *shari'a*. Euphemisms such as *ribh* and *mu'amala* were often used instead.[491]

Ebu's-su'ud issued fatwas legalizing *kanun* provisions on interest on loans. The problem that Ebu's-su'ud faced was that this was, just with the case of cash *waqf*, never authorized in Hanafi law. He resorted to *hiyal* as a tool to circumvent the Islamic legal doctrine that forbids the usage of *riba*. He placed emphasis on the concept of *mu'amala shari'ya* instead.[492] Even though there was a fluctuation in the rate of interests on loan, in 1565, the rate was set at 15%.[493] He issued a fatwa in response to a question asking what would happen to a person who carries out a transaction at a 20% interest rate, stating that, "a severe chastisement and a long imprisonment are necessary. He should be released when his reform becomes apparent."[494] Even though *mu'amala shari'ya* was legalized, there were still efforts to impose limitations and control the money market. Imber contends that, "Ebu's-su'ud in fact had a more urgent and…more practical concern than

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[488] Heyd, *Old Ottoman Criminal Law*, p. 122.
[489] Rafeq, Abdul-Karim. "The Syrian 'Ulama, Ottoman Law, and Islamic Sharia." *Turcica, Revue d'Etudes Turques,* vol. 26, 1994, p-9-32.
[490] Ibid., p. 13.
[491] Ibid.,
[492] Imber, *Ebu's-Su'ud*, p. 145.
[493] Ibid.
[494] Ibis., 145-146.

concealing interest, and this was to prevent extortion by controlling the percentage at which it was payable."[495]

II. The Qadi

When discussing what has been since the Umayyad period the essence of the judicial establishment, it is difficult to place the *qadiship* within the framework of change and development the same way one could when examining the evolutions in the institution of *muftiship*. Seeing as that the institution of the *seyhulislam* was chiefly an Ottoman innovation, it was less challenging to offer a clear-cut outline of the pre and post Ottoman bureaucratization and institutionalization of the office. However, the same does not readily apply to the office of *qadi* given that its foundation could be traced back to the Umayyad period. This section will nevertheless attempt to pinpoint the main junctures of developments of the *qadiship* during the Ottoman period and the important place it fulfilled in the legal system of administration.

Upon examining the evolution of the office of *qadi* over the centuries and up to the Ottoman period, one often comes across the Max Weber theory of *kadijustiz* (*qadi* justice).[496] It serves to point out here briefly the workings of this Weberian system. He believed that the development and evolution of law was dependent on rationality and predictability, which hence set forth the 16th Century rise of capitalism in the West.[497] On the other hand, he held the conviction that Islamic law was not based on the same merits. The notion of *kadijustiz* prescribed that, as quoted by Elyse Semerdjian, "judges [in

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[495] Imber, *Ebu's-Su'ud*, p. 145.
[496] Semerdjian, Elyse, *"Off the Straight Path": Illicit Sex, Law, and Community in Ottoman Aleppo*. Syracuse: Syracuse University Press, 2008, p. xxii.
[497] Gerber, *State, Society, and Law*, p. 26.

Islamic society] never refer to a settled group of norms or rules but are simply licensed to decide each case according to what they see as its individual merits."[498] This dictated a system where the *qadi* was not actively engaged in a guided and canonized system of rules; that his judgments were based on arbitrariness and his authority unbounded.[499] He acted on his own instincts where his swift and uncalculated judgments were final and could not be appealed.[500] Thus, "Islamic law was judicially primitive and undeveloped."[501] However, many contemporary scholars have risen against the Weberian *kadijustiz* with intricate studies on the adequacy of Islamic law as a positivist law.[502] Nonetheless, the purpose here is not to delve into the refutations and the sociological arguments that developed against the viability of the Weberian notion of *kadijustiz*, but rather to give a brief idea when moving forward with examining the evolution in the office of the *qadi* that the Ottoman judiciary was not a stagnant form of legal body but was one that was adaptable and capable of change and development. It was not one that was generally based on arbitrariness or the whimsical character of the *qadi*. On the contrary, as Pierce argues, the personality and integrity of the *qadi* played an important aspect in legal practice and the quality of the administration of justice.[503] Thus, there was emphasis that was placed in Islam on the etiquette that a *qadi* should retain as well as

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[498] Semerdjian, Elyse, *"Off the Straight Path:" Illicit Sex, Law, and Community in Ottoman Aleppo*. Syracuse: Syracuse University Press, 2008, p. xxii.
[499] Gerber, *State, Society, and Law*, p. 11.
[500] Semerdjian, *"Off the Straight Path,"* p. xxii.
[501] Gerber, *State, Society, and Law*, p. 11.
[502] See Wael Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni "Usul al-Fiqh*;" Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective;* and Khaled Masud's work in *Islamic Legal Interpretation: Muftis and Their Fatwas.*
[503] Pierce, *Morality* Tales, p. 92.

certain qualities—seven in number according to Al Mawardi[504]—that would make him eligible to becoming a *qadi*.

The *qadi* serves as one of the most important elements in understanding the dynamic relations between the Ottoman state and its subjects seeing as that he was stationed at the center of the government, society, and law. The office of the *qadi* and the prominent place it came to retain by the Ottoman period is closely interconnected with the state's many attempts to standardize the law of procedure and to integrate people within the state structure by placing a court and a *qadi* in every province. As the enforcer of the law, the *qadi* was considered as an integral component in the establishment and centralization of the Ottoman administration.[505] However, in order to work out the degree of developments undertaken by this office by the 16th Century as well as the innovations introduced to it, it is interesting to trace back the developments it sustained in the pre-Ottoman period.

The classical tradition of appointing the qadi has been long before the Ottomans a prerogative of the ruling authorities.[506] Under the Umayyad rule (661-750), the qadi exercised an important role in the formulation of Islamic law. He relied on his independent reasoning based on a combination of ethical traditions derived from the Qur'an and traditional practices extracted from other legal systems.[507] Nonetheless, with the materialization of more coherent doctrines of the four Sunni schools of law and the articulation of a hierarchy of authorities regarding the interpretation of the law, the qadi gradually lost his capacity as a *mujtahid*. This prerogative went to the muftis whereas the

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[504] Al-Mawardi, Abu'l-Hassan, *Al-Ahkam As-Sultaniyyah: The Laws of Islamic Governance*, p. 98-100.
[505] Inalcik, *The Ottoman Empire: The Classical Age,* p. 118.
[506] Pierce, *Morality Tales,* p. 95.
[507] Hoexter, "Qadi, Mufti and Ruler," p. 68.

qadi became the enforcer of the law and not the interpreter of it.[508] Those judicial transformations took place shortly after the *mihna* (failure of inquisition) in 849 under the Abbasids.[509] Before moving further, it is important to note here other developments that unfolded at the onset of the reign of the Abbasids (750-1258) and before the changes in the judiciary of 849.

Under the Abbasids, the judiciary was organized and put in order for the first time. Earlier during the Umayyad period, the *qadi* acted as the legal advisor of the governors.[510] However, the qadi ceased exercising this function and by the Abbasid period, his functions became more closely tied to the shari'a where he was to adjudicate only in accordance to the sacred doctrine from the moment he assumed qadiship until he was released from his duties.[511] Even though the qadi employed a degree of independence wherein the authorities could not interfere in his affairs, his jurisdiction was limited when it came to matters of criminal procedures. Seeing as that the administration of justice in criminal affairs did not directly fall within the bounds of the shari'a—and the qadi's judgments were confined by the shari'a—the qadi came to rely on other official authorities and the caliph for the enforcement of his sentences in regards to criminal matters. This opted for the increased intervention of official authorities in the office of the qadi wherein the qadi became easily subject to dismissals.[512] This form of administration of justice executed by the caliph and his state officials came to be known as siyasa—

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[508] Hoexter, "Qadi, Mufti and Ruler," p. 68.
[509] Ibid.
[510] Schacht, Joseph. *An Introduction to Islamic Law*. Oxford: Clarendon Press, 1964, p. 50.
[511] Ibid., 50.
[512] Ibid.

"state policy…and…the right of the ruler and his agents to impose discretionary punishment."[513]

Nevertheless, the Abbasids moved towards the creation of a centralized institution of qadiship. This is seen in the establishment of the office of the chief qadi (qadi al-qudat) who served as the Caliph's subordinate in regards to appointments and dismissals of qadis as well as other judicial officials, which became one of his chief tasks.[514] He also acted as the Caliph's counselor in all matters regarding justice.[515] In spite of the institutionalization of the office of the qadi, there were other developments undertaken during the Abbasids that coincided with its centralization. The creation of the *mazalim* tribunals (courts of appeal) is one important aspect of those developments that will be mentioned here. The mazalim courts functioned separately from the qadi's tribunals. The sultan himself presided over the mazalim courts or delegated his officials to hear subjects' complaints against the injustices or wrongful sentences passed by qadis or executive officials. The creation of such a tribunal to a degree hindered the authority the qadi exercised wherein certain cases regarding's property for instance were meant to fall under the jurisdiction of the qadi court but were nevertheless dealt with in the mazalim courts. Moreover, seeing as that the qadi courts (or shari'a courts) operated within the scope of the shari'a, there were matters that could not be brought before the qadi. Thus, the mazalim courts functioned as a supplementary organ dealing with lawsuits that the qadi courts fell short of.

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[513] Masud, Khalid, Rudolph Peters, and David S. Powers. "*Qadi*s and their Courts: An Historical Survey," in *Dispensing Justice in Islam: Qadis and their Judgments*. Eds. Muhammad Khalid Masud, Rudolph Peters, and David S. Powers. Leiden: Brill, 2006, p. 12.

[514] Schacht, *An Introduction to Islamic Law*. P. 50-1.

[515] Masud, Peters, and Powers, "*Qadi*s and their Courts," p. 12. The nature of the office of the *qadi* as a whole changed in some respects after the *mihna*. Despite having exercised a degree of independence, the *qadi*'s appointment became based on his degree of loyalty to the caliph and his willingness to enforce his policies and religious ideals. (13)

This dichotomy of the administration of justice was to continue on under the Mamluk Sultanate.[516] However, the mazalim courts were abolished under the Ottomans in the reformulation and development of the Ottoman judicial system, which put an end to the separation of tribunals. The Ottomans gave the shari'a courts of the qadis superiority by creating one court that dealt with both the secular and shari'a matters and abolishing the mazalim tribunals.[517] This could be reflected in one of the main objectives of the Ottoman restructuring of the judiciary, which was to standardize and systematize the legal system of administration.[518] The pre-Ottoman period suffered from a plurality in the number of those who administered justice. Thus, the emphasis that was placed on the role the qadi exercised aimed at creating a more consistent and coherent system of judicial procedures.[519] The practice of placing the qadi's office at the heartland of the state's administration was one way of permanently integrating it into the apparatus of the state in the refining period of the Ottoman Empire. Gerber adds that one reason for the elevation of the office of the qadi was to counterbalance the degree of authority the religious bureaucracy exercised.[520]

A clearer understanding of the nature of the office of the qadi and its functions under the Ottomans is of importance here. Seeing as that the Ottomans opted for the amalgamation of the functions of the mazalim and shari'a courts into one court under the qadi's jurisdiction, the qadi's role was broadened to include that of a "civil administrator"

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[516] Heyd, *Old Ottoman Criminal Law*, p. 215; see Leanor Fernande, "Between *Qadi*s and *Mufti*s: To Whom Does the Mamluk Sultan Listen? Cairo: American University Press, 2002 for functions of *qadis* under Mamluks.
[517] Heyd, *Old Ottoman Criminal Law*, p. 215.
[518] Hanna, Nelly. "The Administration of Courts in Ottoman Cairo," in *The State and its Servants: Administration in Egypt from Ottoman Times to the Present*. Ed. Nelly Hanna. Cairo: The American University in Cairo Press, (1995): 45-59.
[519] Gerber, *State, Society, and Law*, p. 78, 69.
[520] Ibid., 78.

besides his role as an enforcer of the religious law.[521] His most crucial function was the operation of the court, which was also extended to deal with criminal and secular matters that were not necessarily bound by the shari'a laws.[522] Other than overseeing the affairs of the court and adjudicating lawsuits, the qadi performed other legal formalities that involved registering marriage contracts, the selling and buying of property, as well as registering loans.[523] He also played a role in the distribution of inheritance, administering waqfs, and the regulation of taxation levels.[524] Furthermore, the qadi served as the legal guardian for orphans, brides, and those who had no guardians.[525] He was assigned to carry out inspections and submit a report (However, this was particularly a function of the provincial *qadi*).[526] Additionally, the *qadi* acted as a mediator between disputing parties before taking the case to court.[527] The broadening of the functions and role of the *qadi* situated him and his court at the locus of the judicial system, which was an Ottoman innovation that was unprecedented in Islam.[528] Taking on responsibilities that went beyond the enforcement of the *shari'a* depicts the increased secular role the *qadi* came to fulfill as a civil administrator. However, it is important to note here that despite the amplification of his office and the upsurge in the multitude of tasks he came to hold, the *qadi* remained first and foremost a subordinate of the sultan. He was his representative,

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[521] Van Den Boogert, Maurits H. *The Capitulations and The Ottoman Legal System*. Leiden: Brill, 2005, p. 47; see also Heyd, *Studies in old Ottoman Criminal Law*, p. 225 and Lybyer, *The Government of the Ottoman Empire,* p. 42.
[522] Boogert, *The Capitulations and the Ottoman Legal System*, p. 42.
[523] Imber, Colin. "Government, Administration and Law," in *The Cambridge History of Turkey,* 2: *The Ottoman Empire as a World Power, 1453-1603*. Eds. Suraiya N. Faroqhi and Kate Fleet. New York: Cambridge University Press, 2013, p. 232 and Boogert, *The Capitulations and the Ottoman Legal System*, p. 43.
[524] Imber, Colin. "Government, Administration and Law," p. 232 and Boogert, *The Capitulations and the Ottoman Legal System*, p. 43.
[525] Boogert, *The Capitulations and the Ottoman Legal System*, p. 43.
[526] Inalcik, *The Ottoman Empire: The Classical Age,* p. 92.
[527] Boogert, *The Capitulations and the Ottoman Legal System*, p. 43.
[528] Gerber, *State, Society, and Law in Islam,* p. 77.

empowered to execute and enforce the sultanic decrees.[529] The *qadi* obtained his orders and authority directly from the sultan and could personally petition him without a mediator in between them.[530]

In their efforts to standardize and centralize the law of procedure throughout the empire, the Ottomans sent a copy of the *kanunname* to every qadi's court.[531] The kanun specifically pinpoints the functions and role of the qadi in enforcing the law. Gerber contends that "[this indicates] that the Ottomans certainly intended the kadi, and as a rule no other authority, to apply the kanun."[532] However, the sultan ordered the *Vizier*s too to administer justice according to both the shari'a and the kanun;[533] but the innovation here is in the development discerned in the broadening of the authority of the qadi by instructing him to enforce his judgments according to both laws. This is reiterated in a number of kanuns, where the qadi is enjoined to carry out his investigations "according to the shari'a and the kanun," or "according to the noble shari'a and the *kanunname* deposited in the law-courts" as stated in the text of the law code.[534] The preface of the Ottoman Criminal Code complied by one of the clerks in a shari'a court in the 17th Century states that:

> The judges of the sacred law are not restricted to hearing *shari'a* cases only but are appointed and ordered to decide disputes and terminate litigation in regard to both *shari'a* and 'urf matters. Therefore, just as on shari'a questions fikh works are studied, so it is considered [their] duty in regard to 'urf matters to study the registers of the Sultan's kanuns.[535]

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[529] Inalcik, *The Ottoman Empire: The Classical Age,* p. 118.
[530] Heyd, *Old Ottoman Criminal Law*, p. 220.
[531] Gerber, *State, Society, and Law in Islam,* p. 65.
[532] Ibid., 63.
[533] Heyd, *Old Ottoman Criminal Law*, p. 215-6.
[534] Ibid., 216.
[535] Ibid.

This delineates the power and jurisdiction bestowed on the qadi in overseeing the execution of the shari'a laws as well as the sultanic decrees. In certain cases, the qadis responded and adjudicated on lawsuits that were governed only by the kanun.[536] When there was no sufficient evidence for the qadi to pronounce a shari'a judgment, he did so in accordance to the kanun.[537] When the matter was not evidently clear in the kanun provisions, he sent to the capital for a judgment and executed the sentence that he consequently received.[538] Having the kanun at their disposal, the qadis exercised a broad discretionary form of authority that was different from earlier periods in Islam.

Furthermore, in endowing the qadi with such powers under the Ottoman law, it is interesting to see the nature of the relationship between the qadis and the executive officials that throve from such regulations. Both qadis and the executive officials exercised the authority of administering justice on the sultan's behalf. The different functions between the two are highlighted in the *kanunname* of the 17th Century wherein the qadis "are to carry out the laws of the shari'a…but are ordered to refer matters relating to public order, the protection and defence of the subjects, and the capital or corporal punishment (*siyaset*) [of criminals] to the [local] representatives of the sultan, who are the governors in charge of military and serious penal affairs." By order of the sultan, those were the two authorities to administer justice in the provinces. The executive official (governors, *Vizier*s, and other high-ranking officials)[539] represented the sultan's executive authority, whereas the qadi represented his legal authority.[540] Despite exercising the sultan's executive authority, the sultan's officials' powers were to a degree

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[536] Heyd, *Old Ottoman Criminal Law*, p. 217.
[537] Ibid., 218.
[538] Inalcik, *The Ottoman Empire: The Classical Age,* p. 75.
[539] Heyd, *Old Ottoman Criminal Law*, p. 192.
[540] Inalcik, *The Ottoman Empire: The Classical Age,* p. 104.

limited by the new kanun provisions. The governors were the qadis' real contenders. They seized some of the functions and authorities that the qadis employed.[541] Thus, one of the main goals of Suleyman I's series of reforms in the 16th Century was to curtail the power of the executive officials. This was done through giving the qadis the capacity to oversee the legality of the executive officials' actions. One of the means in which the kanun kept the latter's authority in check was by entrusting the qadi with a number of prerogatives that the executive officials first had to go through before taking certain measures. The *qadis* were thus placed in charge of overseeing the actions of the executive officials who had to take permission from the *qadi* before imprisoning or torturing suspects for confessions.[542] Nevertheless, not all executive officials were pleased with such judicial dominance and power being usurped from them. Some even went as far as petitioning the sultan against being put through the innovation of being judged by a qadi,[543] which in all probability they deemed to be inferior to them.

However, the executive officials still retained some power over the qadi. According to the *kanun* criminal code, in the case where the *qadi* examined the evidence of the case and reached the conclusion that the evidence were not sufficient enough for him to carry out a *shari'a* punishment, he would then write a certificate (*huccet*) detailing the statements of the case without suggesting a suitable sentence, and would in turn hand the case over to the executive officials who would then administer a *siyasa* punishment.[544] The final sentence, however, was the *qadi*'s and not the executive

[541] Gerber, *State, Society, and Law in Islam,* p. 70.
[542] Peters, *Crime and Punishment*, p. 76.
[543] Gerber, *State, Society, and Law in Islam,* p. 71.
[544] Peters, *Crime and Punishment*, p. 76.

official's.[545] Moreover, the *qadi* possessed the capacity of supervising financial affairs[546] and he was the one responsible for collecting local tax revenues and handed them over to the governor to hand over to the military.[547] It had to first go through the *qadi* who would directly report any illegal actions committed by the executive officials.[548] It is important to note further the kind of functions the executive official administered in order to delineate the differences between him and the qadi. According to Jennings, he cites that, "The principal duties of the *sancak begi* (the governor of a sancak) did not go beyond, from the military point of view, going on campaign at the head of the timar-holding spahis; from the administrative point of view, putting into force the police matters of cities in the sancak; and protecting the tranquility of the timar lands providing soldiers (more correctly, of the revenues which do not have the right of independence). All matters outside of these two duties lay within the authority of the kadi of every judicial district."[549] Thus, this division of tasks was an essential aspect of aiming to develop a just administrative system, by keeping the authority of both functionaries constantly in check.

Another significant innovation that was introduced by the Ottoman authorities concerning the office of the qadi was the introduction of courthouses for the first time. This was true in regards to the Arab provinces. There already existed judicial districts headed each by a qadi in Anatolia.[550] However, the case was different under the Mamluks. The Mamluk four *qadi al-qudat* usually had designated buildings used as courthouses. As for the other qadis, seeing as that they were not compelled to convene in

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[545] Jennings, Ronald C. "Kadi, Court, and Legal Procedure in 17th C. Ottoman Kayseri: The Kadi and the Legal System." Studia Islamica, No. 48 (1978): 159.
[546] Inalcik, *The Ottoman Empire: The Classical Age,* p. 118.
[547] Jennings, "Kadi, Court, and Legal Procedure," p. 158.
[548] Inalcik, *The Ottoman Empire: The Classical Age,* p. 118.
[549] Jennings, "Kadi, Court, and Legal Procedure," p. 159.
[550] Hanna, "The Administration of Courts in Ottoman Cairo," p. 48.

a specific place, they held sessions in their places of residence or in mosques. With the Ottoman conquests of 1516 and 1517, courthouses were introduced in different districts of the provinces.[551] This was one way of encouraging the public to take their disputes to the court before the qadi.[552] It also emphasized the qadi's image as a "public prosecutor"[553] and his importance in dispute resolutions. Furthermore, as previously mentioned in Chapter 1, the Ottomans abolished the plural legal system of having four *qadi al-qudat* represent each Sunni school of law and appointed one chief Hanafi qadi to represent the Ottoman official school. The sultan-appointed chief qadi usually served a term of one year and was normally a Turk.[554] Being of non-Arab origins did not give much room for him to get accustomed with the local practices and traditions. This might have been one way of maintaining a form of neutrality between the judge and the subjects when it comes to adjudicating lawsuits. Moreover, by placing one Hanafi chief qadi, the Ottomans ensured that the Hanafi's position was elevated above that of the other schools.[555] Despite having abolished the plural system of the Mamluks, there were deputy qadis (na'ibs) representing the four schools placed in each courthouse and usually served for life.[556] Likewise, being appointed to an important province served as a medium for the chief qadi to attain higher positions in the future such as becoming kadi-'asker.[557]

What is concluded from the Ottomanization of the judiciary and the introduction of new policies is that the Ottoman authorities opted for creating a standardized system that would be closely linked to the central government. The qadis appointed by the

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[551] Hanna, "The Administration of Courts in Ottoman Cairo," p. 48.
[552] Pierce, *Morality Tales,* p. 124.
[553] Gerber, *State, Society, and Law*, p. 71.
[554] Hanna, "The Administration of Courts in Ottoman Cairo," p. 45.
[555] Pierce, *Morality Tales,* p. 100.
[556] Hathaway and Barbir, *The Arab Lands Under Ottoman Rule,* p. 117.
[557] Hanna, "The Administration of Courts in Ottoman Cairo," p. 45.

authorities were usually "trained and dispatched from the Ottoman government."[558] Perhaps this served as a stepping-stone to infiltrate the newly appropriated territories with "Ottomanism," given that the appointment of qadis were not arbitrary and was based on centralized procedural appointments highly controlled by the government.[559] Another way of standardizing judicial procedure and bringing in line the different provinces of the empire was introducing the system of record keeping. During the Mamluks, qadis recorded the cases in their personal documents, which they kept at home. This changed under the Ottomans, where each courthouse had to have a register of court records drawn up by the qadi and his assistants.[560] This form of bureaucratization was once again an effort of standardizing procedure throughout the provinces, which would make "legal transactions…universally recognized."[561] This meant, as brought to attention by Hanna, "a person could, in one of the courts of Cairo, buy a house in Damascus."[562]

The Question of Judicial Corruption

Noel J. Coulson's article "Doctrine and Practice in Islamic Law: One Aspect of the Problem," evokes the important question of judicial corruption. He argues that in the early period of Islam, there was widespread contempt and fear amongst people of becoming a *qadi*. He provides many cases that prove the extent of this aversion towards the post, nominally as it was believed to contradict piety and moved towards "worldly advancements and material gain."[563] That even if a *qadi* who has been nominated was

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[558] Semerdjian, *"Off the Straight Path,"* p. 99.
[559] Pierce, *Morality Tales,* p. 100.
[560] Hathaway and Barbir, *The Arab Lands Under Ottoman Rule,* p. 118.
[561] Pierce, *Morality Tales,* p. 100.
[562] Hanna, "The Administration of Courts in Ottoman Cairo," p. 49; Pierce, *Morality Tales,* p. 100.
[563] Coulson, Noel J. "Doctrine and Practice in Islamic Law: One Aspect of the Problem," *Bulletin of the School of Oriental and African Studies* 18, no. 2 (1956): 213.

pious, the post itself would lead to ruin regardless.[564] Pierce explains that, "According to Hanafi tradition, two of the school's founding fathers had to be beaten or imprisoned before they could be induced to accept the office of the judge."[565] This abhorrence towards the office of the qadi might have been to an extent exaggerated; however, it still calls into question the emphasis that was placed on the integrity of the qadi. The religious scholars were often reluctant to accept the office of the qadi because it meant that they were yielding to "worldly concessions" by accepting being paid in return for their services as well as being at times challenged by producing just sentences.[566] In order to avoid bribery, qadis were forbidden to accept gifts or private invitations.[567] Thus, not only was the qualification of a *qadi* necessary in assuming office, but also his character. By the same token, the Ottoman authorities placed the same emphasis on the integrity of the *qadi* by entrusting him with such prerogatives as previously mentioned. Achieving justice was in large dependent on the rectitude of the *qadi*.[568]

This daunting rhetoric of doubt of the qadi's integrity resonated well into the Ottoman period. In a fatwa by Ebu's-su'ud, he implicitly emits the view that muftis are generally considered to be of a more honorable standing than qadis seeing as that their appointments are not dictated by a systematic judicial procedure but rather based on eminence of their "personal qualifications;" and that their opinions are based on religious texts unlike the sentences of the judges.[569] To what extent were those the real intentions of the fatwa of Ebu's-su'ud as explained by Pierce could be contended. However, it still

[564] Coulson, "Doctrine and Practice in Islamic Law," p. 214.
[565] Pierce, *Morality Tales,* p. 118.
[566] Pierce, *Morality Tales,* p. 93, 118.
[567] Ibid., 182.
[568] Heyd, *Old Ottoman Criminal Law*, p. 212.
[569] Pierce, *Morality Tales,* p. 183.

indicates that there was a problem in regards to the qadi's conduct in office. It is true that some indeed misused their positions of power. Heyd contends that the 16th Century saw the decline of the qadi where there was a growing tendency to seek the office of the qadi; some "even paid bribes to obtain them."[570] The corruption of the office in part emanated from, as Heyd further argues, the lack of being paid a sufficient salary. In compliance with the kanun, the authorities permitted the qadi to take money from recipients as free gifts in the issuance of certificates for instance based on the recipient's own free will.[571] However, it is alleged that some qadis abused this by unlawful fees and regarding them as otherwise on the basis that they are given as free gifts. Hence, the qadis would try to adjudicate on as many cases as they could to obtain money.[572] Moreover, they were said to go on visits in their respective locality and usurp illegal fines and fees from people.[573] There was an overall willingness of qadis to accept bribes. When it came to administering justice and bringing offenders before the law, Heyd alleges that some qadis failed to do so. In a case that he relates to is of a Bursa qadi in the 16th Century who refused to report to the government the wrongdoings of robbers in his locality claiming, "I fear for my heard."[574] Consequently, it is argued that people began to lose their trust in the judicial system and preferred to keep some matters private rather than bringing their cases for investigation before the qadi.[575]

Besides the court records, the *Şikayet Defterleri* (Registers of Complaints) is one way that helps in better formulating the question of corruption of the qadi's office. The

570 Heyd, *Old Ottoman Criminal Law*, p. 213.
571 Ibid.
572 Ibid., 213-14
573 Ibid.
574 Ibid., 215.
575 Ibid.

extent of the qadi's corruption and loss of integrity might be at times exaggerated. However, the petitions brought against the qadis by state subjects produce evidence that corruption of the judiciary did indeed exist. According to Gerber, "corruption and bribery by judges were often viewed as the root cause of other major types of decline and disintegration."[576] Hence the link that is often drawn between the rhetoric of decline of the 16th Century and the disintegration of the qadis and governors.[577] However, the emphasis here is usually placed on the corruption of the qadis more than the governors, possibly because of the significance and urgency placed on the qadi having to always retain a just image as the prosecutor. Based on a study of the registers of complaints by Gerber, he notes that there were 71 complaints against qadis and a much higher number against governors. Very few of those complaints were against qadis holding office in large cities, which indicates that there was more pressure in the central areas of the empire on qadis maintain their integrity. However, upon examining the nature of those complaints, Gerber concluded that there was a lack of explicit complaints sustaining that qadis adjudicated unfairly for the sake of bribes. The bulk of complaints involved the qadis obtaining illegal taxes. Moreover, based on his studies of thousands of Bursa court records, Gerber argues that the qadi system was considered fair for the most part and that the registers of complaints predominantly imply that even though there was indeed a problem, it did not warrant deeming the whole system as corrupt.

However, two arguments could be raised here. Firstly, as noted in the previous chapter, the process of petitioning was a costly one; thus, not everyone was capable of sending petitions to the capital. Moreover, as Inalcik had stated, justice was considered to

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[576] Gerber, *State, Society, and Law*, p. 156-7.
[577] Heyd, *Old Ottoman Criminal Law*, p. 212.

be greater near the capital,[578] meaning that the far off provinces had a difficulty in utilizing the system of petitioning. Secondly, Gerber's study of the Bursa court records, while they might be an accurate indication of what took place in 17th Century Bursa, it is certainly not an accurate indication of what took place in other provinces. As such, in order to reach the conclusion in regards to the question of judicial corruption being a reality or not, one must venture on a closer examination of court records and other possibly existing personal journals from different areas of the empire to deduce the reality of the problem.

[578] Inalcik, *The Ottoman Empire: The Classical Age,* p. 91.

CHAPTER 4: LAW IN PRACTICE: *REGULATING MORALITY*

The recount of one of the renowned Mamluk stories, as told by Ibn Iyas and cited by Rapoport, serves as an interesting beginning for the buildup of this chapter. In 1513, Sultan Qanush sentenced two adulterers to death amidst altercations that took place between himself and a number of jurists. On the 4th of December of that year, a wife of a Hanafi deputy *qadi*, Ghars al-din Khalil, summoned her lover, Nur al-Din al-Mashali—a Shafi'i deputy *qadi*—to her house in the absence of her husband who was expected to be away for the whole night.[579] After being informed of the visit by a neighbor, Khalil went back to his house to find his wife in bed with al-Mashali. Refusing to be silenced by both al-Mashali's and Khalil's wife's offers of one thousand dinars and all her trousseau of household belongings out of fear for their reputation, the infuriated Khalil locked them both in the house and went to the military chamberlain's court to issue a complaint against them.[580] When al-Mashali was confronted with the accusations, he confessed and was sentenced along with Khalil's wife to be stripped and beaten. As a sign of humiliation, both publicly rode donkeys backwards in the city and were fined 100 dinars each. When the wife claimed that she had no money, Khalil was ordered to pay the fine, and was arrested when he did not.[581] When Sultan al-Ghawri learnt of the story of the adulterers, he ordered that the two be stoned in accordance with the *shari'a*, which was a rather uncommon form of punishment that rarely took place at the time.[582] In response, the *ulama* issued a *fatwa* rendering the sultan's sentence invalid on the account that al-

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[579] Rapoport, Yossef. "Women and Gender in Mamluk Society: An Overview." The Middle East Documentation Center, 2007, p. 1-47.
[580] Ibid., 1-2.
[581] Ibid.
[582] Ibid.

Mashali had withdrawn his confession and on the basis that there was a lack of evidence in accordance with the *shari'a* to prove the act of fornication took place.[583] Carrying on back and forth with the altercations between the sultan and the *ulama*, the latter declared that the sultan would be legally responsible for paying blood money if the pair was executed. Angered by the *ulama,* whom he called "senseless fools," the sultan dismissed all four *qadi al-qudat* and ordered the execution of al-Mashali and Khalil's wife. Their bodies were left to hang for two days at the house of one of the *ulama* who had protested against the sultan's sentence.[584]

In order to proceed with placing the story within the context of the Ottoman framework, a few aspects of relevance here have to be taken into consideration. First off, when Khalil was offered to settle the matter with al-Mashali between the three of them, the former refused and still chose to take the matter to court. This is an indication that by the 16th Century the state played an important role in regulating morality and what was once kept within the bounds of the household. However, an important aspect has to be contemplated here: this case involved deputy *qadis* who by all means, in theory, should have possessed the highest form of integrity. Moreover, it prompted the involvement of the sultan who showed his discontent towards the *ulama* for choosing a person like al-Mashali as a deputy *qadi*. Thus, it was apparently a high profile case and it does not necessarily mean that all matters of *zina* (fornication) were dealt with in the same manner. Secondly, this story is also an indication that the concept of fining the perpetrators did exist during the Mamluks. What system of fining the Mamluks followed or upon what basis they chose to fine the two 100 dinars is not of importance here. What

[583] Rapoport, "Women and Gender in Mamluk Society," p. 1-2.
[584] Ibid.

is of relevance is that the notion of fining was used as a method of punishment. Lastly, the lack of evidence in accordance with Islamic law seems to have served as an important aspect of the *ulama*'s argumentation against the sultan's decision for execution.

Even though the purpose here is not to offer an in depth analysis of the forms of punishments that took place during the Mamluks, this story serves as an interesting point of departure in understanding how the Ottoman legal system developed in terms of regulating its subjecting and bringing the private to the public sphere. Despite the existence of a court during the Mamluk sultanate, the degree of accessibility to courthouses increased dramatically by the 16th Century under the Ottomans.[585] This was owed to the upsurge in the number of courthouses and their introduction for the first time in some of the provinces of the Ottoman Empire, which encouraged more people to use the courts in settling their disputes.[586] Moreover, in regards to sentencing the offenders to the payment of fines, this practice became an integral part in the Ottoman legal code and was broadened to include a large number of crimes.[587] It was systematized under the Ottomans in such a way that it almost became the most common form of punishment. Additionally, the issue of 'evidence' in Islamic jurisprudence when it comes to proving cases of fornication is of significance here seeing as that it perhaps played a role in part of the introduction of *kanuns* that served as a tool in policing morality.

What follows in this chapter is an in depth analysis of three Ottoman legal innovations in the fields of marriage, *zina*, and prostitution that changed the course of

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585 Hanna, Nelly. "The Administration of Courts in Ottoman Cairo," in *The State and its Servants: Administration in Egypt from Ottoman Times to the Present*. Ed. Nelly Hanna. Cairo: The American University in Cairo Press, (1995): 50.
586 Ibid., 50.
587 Heyd, Uriel. *Studies in old Ottoman Criminal Law*. Ed. V.L. Menage. Oxford: Clarendon Press, 1973, p. 277.

regulating the public behavior.[588] The previous chapters were an attempt to analyze the introduction of certain features that took part in the establishment of the Ottoman legal administration in order to fully grasp how law was imposed from above by the state functionaries. This chapter will follow suit by aiming to assess the repercussions of the implementation of the new Ottoman *kanuns* and to examine how society came to interact and function within the realm of the Ottoman system of administration on the grassroot level. Moreover, it will explicate further how the newly codified and more comprehensive Ottoman legal codes brought about changes in the law of procedure as well as dealt with cases that were not expanded on in the *shari'a* and were not easily enforceable, bearing in mind that the regulations that will be studied here were attempts by the Ottoman authorities to standardize the way societal behavioral patterns were dealt with.

Marriage Fees

The Ottoman introduction of 'fiscalized' policies were not only limited to the type of punishments that were prescribed against offenders. In the Ottomanization process of the judicial system, the Ottoman authorities introduced yet another notable innovation to the courthouses. People who went to court were now obligated to pay a fee for every case.[589] A fee was designated depending on each case that came to court, and in every courthouse, there was an Ottoman employee (*shawish*) who was responsible for collecting the fees.[590] The fees were then divided among the indigenous staff working in the courthouse, the Hanafi *qadi al-qudat*, and the sultan. Moreover, the local *qadis'* incomes highly depended

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[588] The examples here will focus on the Arab region.
[589] Hanna, "The Administration of Courts in Ottoman Cairo," p. 46.
[590] Ibid., 47.

on those fees seeing as they were not paid by the state.[591] This was not a novelty that was introduced only in the Arab provinces, but in all provinces of the empire as an attempt of standardizing the law of procedure.[592] One reason for the introduction of this policy that Hanna gives is that "perhaps because the Ottoman officials wanted the judiciary system to pay for itself."[593] This serves as one example of imposing changes on society that was not welcomed by the state's subjects. Not only were people forced to pay a fee when going to court, they were enjoined by law to bring certain cases to be registered by the court.[594] Marriage was one such case.

Every *shari'a* court by law became responsible for recording and registering contracts and all forms of dealings that came before the court.[595] Registering and applying a fee for marriage contracts was the first type of fees to be instilled by the court.[596] This was certainly an Ottoman innovation that was unheard of in Islam. There is no record in the *shari'a* doctrine that necessitates the drawing up of a marriage contract, let alone for marriage to be registered by a court.[597] In Islam, a marriage was regarded as a private form of agreement that entailed "a silver ring or a recitation from the Qur'an as an adequate fee."[598] It neither required any judicial involvement in drawing up a marriage

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[591] Hanna, "The Administration of Courts in Ottoman Cairo," p. 47.
[592] Ibid., 47.
[593] Hanna, Nelly. "Marriage among Merchant Families in Seventeenth-Century Egypt," in *Women, the Family, and Divorce Laws in Islamic History*. Eds. Amira El Azhary Sonbol. Syracuse University Press, 1996, p. 145.
[594] Ibid.
[595] Al-Atafy, Alia. "Rasm 'aqd al-zawaj fi al-'asr al-'uthmani bayn al-muwafaqa wal rafd." *Al Ruzname: The Egyptian Documentary Annals, No*. 10 (2012): 362.
[596] Hanna, "The Administration of Courts in Ottoman Cairo," p. 46.
[597] Hanna, "Marriage among Merchant Families," p. 145.
[598] Rafeq, Abdul-Karim. "The Opposition of the Azhar 'Ulama to Ottoman Laws and its Significance in the History of Ottoman Egypt." In *Etudes sur les Villes du Proche-Orient.* XVIe-XIXe Siecle, (2001): 43-54.

nor did it require a marriage to be registered in any way.[599] In one of the fatwa of Ebu's-su'ud, he reiterates the obligatory registration of marriage. The fatwa is as follows:

> Q: Now that a Sultanic decree has been issued [commanding] that no marriage be concluded without the cognizance of a judge, is a marriage [concluded] without such a cognizance valid?
> A: No, lest it give rise to dispute and litigation.[600]

This might have been one way of administering and controlling the local judicial systems and bringing them in line with those of the other provinces.[601] Perhaps another reason is, as implied from the fatwa of Ebu's-su'ud, that the registration of marriage acted as a form of evidence in case disputes broke out.[602] Moreover, it is noteworthy to underline here that consummating marriages through formal means by state officials served as a way of regulating societal behavioral patterns. Even if that was not the chief reason, the changes instituted acted as a method of preventing "irregular or illicit unions"[603] and regulating the public's morality. Thus, the Ottoman state was bringing the institution of marriage from the private to the public sphere and restraining the subjects' sexual conduct.

What effects did those changes have on the public is of significance here. Taking on the case of Egypt, one can discern how the class of *ulama* reacted to the innovations introduced by the Ottoman authorities. With the state taking up the role of regulating public morality, the indigenous *ulama* were marginalized. When it came to matters of administering justice, the *ulama* in Egypt were greatly impacted by the Ottoman conquests of 1517. The innovations laid out by the Ottoman authorities did not only

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[599] Imber, Colin. *Ebu's-Su'ud: The Islamic Legal Tradition*. Stanford, CA: Stanford University Press, 1997, p. 165.
[600] Imber, *Ebu's-Su'ud*, p. 165.
[601] Al-Atafy, Alia. "Rasm 'aqd al-zawaj fi al-'asr al-'uthmani bayn al-muwafaqa wal rafd." *Al Ruzname: The Egyptian Documentary Annals, No*. 10 (2012): 353.
[602] Imber, *Ebu's-Su'ud*, p. 165.
[603] Ibid.

restrict the *ulama* in the sphere of drawing up marriages—who they regarded as an illegal form of taxation—, but also negatively effected them in regards to appointing one Hanafi *qadi al-qudat*, who was higher in rank than the local deputy *qadis*.[604] As such, a number of *qadis* were dismissed from their posts. Moreover, there was growing fear that the other schools of law besides the official Hanafi *madhhab* would be discontinued and that the Ottoman *kanun* would replace the *shari'a*.[605]

Even though those might have all been attempts to centralize state power in the provinces and to unify the legal administration, the changes introduced were met with great discontent and it was not a challenge-free process on the part of the Ottomans. When it came to the unwelcomed innovation of marriage, both the Azhar and Syrian *ulama* came to regard the imposition of marriage fees as a *fitna* "to which no other *fitna* could be compared."[606] They believed that marriage was not a matter of the judiciary.[607] What further constituted part of the *ulama*'s disgruntlement was also the fact that registering marriages in a court or through Ottoman functionaries meant that the local *ulama* became deprived of the profits they acquired from drawing up marriages. This was not a matter that they could overlook and hence brought their complaints to the authorities. Selim I, who was sultan at the time, dismissed the deputy *qadis* in response along with their witnesses and appointed an Ottoman *qadi al-qudat* (known as *qadi al-'Arab*) to preside over the court and to oversee the legal administration, and who also in turn appointed witnesses of his own choosing.[608] A part from those mentioned earlier

[604] Winter, Michael. *Egyptian Society Under Ottoman Rule: 1517-1798.* New York: Routledge, 1992, p. 108.
[605] Ibid.
[606] Rafeq, "Azhar 'Ulama," p. 44.
[607] Ibid.
[608] Ibid., 44-45.

whom the court paid for, the newly appointed witnesses also received money from the revenue generated by the marriage fees.[609] Despite no longer retaining the role of drawing up marriages, some *ulama* continued to do so in secret.[610] However, when a Shafi'i deputy *qadi* drew up a marriage contract in secret against the decrees of the sultan, "he was beaten by the Ottoman judge and paraded bare-headed through the streets of Cairo."[611] What further escalated the tensions was that several *ulama* were sent to Istanbul in what was regarded as them being exiled.[612] Moreover, seeing as that by 1521, the deputy *qadis* and the witnesses were still not allowed to sit in the Salihiyya *madrasa*, marriage contracts were concluded in the houses of one of the deputy judges.[613] However, the Ottoman authorities tight control was seen even in overseeing the process of concluding a marriage. Troops and representatives assigned by the chief of police were ordered to sit outside the houses of the four deputy *qadis* and collect the fees from the marriage contracts concluded.[614] The fee of a virgin bride in local currency was set at 60 *nisfs*, while that of a previously married woman was set at 30 *nisfs*.[615] Furthermore, a hundred *ulama* took to the governor of Egypt at the time, Kha'ir Bey, entreating him to retract the fees on marriage, which they believed to have completely contradicted the *shari'a*. However, he dismissed their appeals.[616] Thus, they challenged the newly enacted decrees by withholding to marry or divorce anyone and an Azhari *shakykh* even went as far as referring to what was known as *al-yasaq al-uthmani* (Ottoman provisions)

[609] Rafeq, "Azhar 'Ulama," p. 45.
[610] Ibid.
[611] Ibid.
[612] Ibid.
[613] Ibid., 48.
[614] Ibid.
[615] Ibid., 47.
[616] Ibid., 48.

as *yasaq al-kufr*. He was imprisoned as a result but was later set free when the *ulama* intervened.[617]

Further changes took place in Egypt after Suleyman I became sultan. Under the provisions of new sultanic decrees, a *kadi-'asker* was ordered to "replace the four Egyptian deputy judges and discharge judicial business on behalf of all four Sunni schools of law." This once again reconfigured the structure of the deputy *qadis* and their witnesses. The new laws dictated the appointment of one deputy *qadi* from each *madhhab* with two witnesses instead of ten for each *qadi*. Furthermore, any judicial business that does not first go through the *kadi'-asker* would be invalidated.[618] The appointment of the deputy *qadis* was the prerogative of the *kadi-'asker* who ordered them to sit in the Salihiyya madrasa with the Hanafi deputy *qadi* in charge of overseeing and monitoring all judicial matters.[619] However, seeing the growing discontent of the local *ulama*, the government attempted to make concessions by lowering the marriage fees and dividing them on the basis of two categories. A virgin bride from the 'common' class was to pay 43 *nisfs* while a divorcée or a widow was to pay 22 *nisfs* in addition to other fees that would go to the witnesses and *qadis* involved in drawing up the contract.[620]

Cutting down on marriage fees served as a temporary solution. The changes introduced by the new *kanunnames* were met with opposition. People were resisting the novelties that the Ottoman practices injected their society with. Abdul-Karim Rafeq notes that, "marriage procedures became so complicated that people preferred to remain

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[617] Rafeq, "Azhar 'Ulama," p. 48.
[618] Ibid., 49.
[619] Ibid.
[620] Ibid., 50.

single."[621] One other possible reason for institutionalizing marriage was perhaps owed to the fact that with the legal plural system that existed under the Mamluk four *qadi al-qudat*, people exploited that they could maneuver around with the *madhhabs*: getting married in accordance to one and divorced the next day in accordance to another based on what was more of benefit to them. With the new fees imposed, not everyone could afford getting married and people grew more reluctant to do so. Thus, as a result, a class in society disappeared from the marriage scene.

Zina *(Fornication)*

The early codification of *kanun* aimed to deal with cases that were not clearly established in the *shari'a* and attempted to create forms of punishments that could be readily enforceable. With the creation of a more comprehensive and elaborative criminal code, the *kanunnames* of Suleyman I and his predecessors allowed for the state to play an integral role in the way justice was administered through covering a broader range of criminal transgressions where the *shari'a* fell short.[622] What is of importance to examine here is how the state became so involved in sexual discourse and how morality was regulated through publicizing what was once private. The controversial case of *zina* serves as one example of how the state policed the sexual arena vis-à-vis the *kanun*.

Zina is illegal sexual intercourse that occurs outside marriage or concubinage. According to the *shari'a* doctrine, *zina* is one of the crimes that fall under the *hudud* punishments that entail lashing or stoning to death.[623] A man commits zina when he engages in sexual intercourse with someone other than his four wives or concubines,

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[621] Rafeq, "Azhar 'Ulama," p. 50.
[622] Heyd, Uriel. *Studies in Old Ottoman Criminal Law*. Ed. V.L. Menage. Oxford: Clarendon Press, 1973.
[623] Baldwin, James E. "Prostitution, Islamic Law and Ottoman Societies." *Journal of the Economic and Social History of the Orient,* 55 (2012): 117-52.

while a woman does so when she engages in intercourse with someone other than her husband.[624] Gender, marital status, class, age, and religion play an important role in categorizing how zina is dealt with. In compliance with the laws of the *shari'a*, it makes a difference if the offender was: man or woman; married or unmarried; free or slave; adult or minor; or Muslim or non-Muslim.[625]

The Hanafi legal tradition lays down a number of provisions that deal with *zina*. When it comes to the issue of evidence, the Hanafi doctrine takes into account the testimony of four well-reputed male witnesses.[626] They must specify where, when, how, and what took place exactly before the *qadi* as well as identify the woman. When it has been established that the woman was prohibited to the offender and that the witnesses witnessed what took place "like the mascara-stick in the mascara-pot," then the *qadi* can pass his sentence.[627] If the witnesses giving the testimony are less than four, then they are considered slanders; and if they retract their testimony before the stoning takes place, the sentence is reverted and they (the slanders) become liable for the *hadd* of slander. If the stoning had already taken place, the 'slanders' are liable for the *diya* (blood money).[628] When it comes to the confession of the offender, the Hanafi law requires that he be a sane and mature man who is then asked to testify four times on four different occasions. The sentence of the *hadd* penalty is passed only when that happens. However, if the offender

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[624] Ze'evi, Dror. *Producing Desire: Changing Sexual Discourse in the Ottoman Middle East, 1500-1900*. Berkeley: University of California Press, 2006, p. 54.
[625] Ibid., 53.
[626] Calder, Norman. *Islamic Jurisprudence in the Classical Era*. Eds. Colin Imber. New York: Cambridge University Press, 2010, p. 24; Baldwin, *Prostitution*, p. 123.
[627] Calder, *Islamic Jurisprudence in the Classical Era*, p. 24.
[628] Ibid.

retracts his confession before the execution of the punishment, he is set free and is no longer liable for *hadd* punishment.[629]

It is obvious that the Hanafi doctrine required strict proofs in order to establish that a crime of *zina* had been committed. There is a lot of ambiguity that surrounds zina when dealing with it in accordance with the *shari'a* law. It was difficult to establish how to move forward with prosecuting such a crime seeing as that the requirement of four witnesses to be present during the act itself and for all of them to be well-reputed men is rendered almost impossible. Furthermore, the fact that for a confession to be considered viable, the offender had to confess four different times makes it all the more difficult to make a conviction. One can infer that such mechanisms of ambiguity utilized by the Hanafi law were meant to keep sexual matters private and difficult to penalize. Another aspect that contributed to the ambiguity surrounding *zina* is the issue of quasi-ownership of concubines (*shubhat al-milk*). A man can make a number of claims over the ownership of women who are not his wives or concubines. One such claim is that a female slave might have been awarded to him as a pledge; thus, it is licit to commit sexual intercourse with her.[630]

The issue of same-sex intercourse is not dealt with clearly in the *shari'a* doctrine. It is not included in the penalties prescribed to *zina*. Thus, there have been a lot of deliberations surrounding this matter where some jurists believed that devising analogy could not be applied in the case of homosexual intercourse.[631] According to Abu Hanifa nonetheless, he deduced that, by analogy, homosexual intercourse could be dealt with the same as heterosexual intercourse. However, male homosexual intercourse was still not

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[629] Calder, *Islamic Jurisprudence in the Classical Era*, p. 24-5.
[630] Ze'evi, *Producing Desire*, p. 54.
[631] Ibid., 54-55.

treated as a *hadd* offence.[632] Some jurists believed that same-sex intercourse merited execution, while others believed that repentance was sufficient enough for eliminating the enforcement of punishment.[633] However, the *shari'a* deals differently with female acts of homosexuality. Seeing as that no act of intercourse occurs, female homosexual acts are not categorized as *zina* and bears no form of punishment. Yet, Jurists generally condemn such practices wherein some believe that such they warrant a *qadi*'s discretionary punishment.[634]

Elyse Semerdjian argues that, "Ottoman law differs so drastically from the *shari'a* on the subject of punishment that one may speculate that it was an attempt to reconcile the law with the needs of the empire's diverse population."[635] It is here that the Ottomans introduced new principles in dealing with the crime of *zina*. There was great emphasis placed on the crimes of sexual transgressions in the *kanunnames* of Suleyman I and his predecessors. The opening chapter of the Ottoman Criminal Code is titled "On Fornication and Other Offences."[636] It is noteworthy that there were still attempts to conform to the *shari'a* provisions in which the *kanun* maintained that an offender is punished according with its regulations only in case he was not punished under the *shari'a* first. The *kanun* also differentiates between different genders, classes and age as the *shari'a* does.[637] The *kanun* offers a distinctive form of punishment when it implements a penalty of affixed fines in dealing with *zina* set in the 35 articles of the Ottoman Criminal Code instead of the fixed *hudud* punishments prescribed by the *shari'a*

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[632] Ze'evi, *Producing Desire*, p. 54-55.
[633] Ibid., 55.
[634] Ibid.
[635] Semerdjian, *"Off the Straight Path,"* p. 30.
[636] Heyd, *Old Ottoman Criminal Law*, p. 95.
[637] Ze'evi, *Producing Desire*, p. 60.

in case of conviction.[638] Heyd maintains that the shift from the hudud punishments to the punishment by fines is owed to Abu Yusuf's argument that a ruler was allowed to "inflict discretionary punishment by taking money."[639] Nonetheless, as mentioned earlier the shari'a doctrine mostly prescribes either flogging or stoning to death to crimes of *zina*. However, the *kanunnames* replaced the *hudud* punishments with the lighter punishment of fines. It did not enforce the death penalty on crimes of sexual transgressions. However, there were more severe punishments that were imposed on offenders who committed rape or abduction such as castration.[640]

There were five factors to be considered when it comes to determining the scale of a fine: "wealth, personal status, age, servile status, and religion."[641] A Muslim man or woman who is wealthy, free, and married are obligated to pay the highest fine of 300 *akçes*, whereas a poor slave man is compelled to pay 25 *akçes* for the same crime.[642] The practice of male homosexual intercourse is fined by way of the same scale. Nonetheless, under the *kanun*, female homosexual acts were not considered as a felony.[643] Another difference between the *kanun* and the *shari'a* in regards to the regulation of *zina* is that an adulterous married woman must be divorced from her husband in accordance with the *shari'a*. However, the *kanun* necessitates that a husband must pay a fine if he chooses to stay married to his adulterous wife.[644] According to Article 6 of the Ottoman Criminal Code, a man must thus pay 100 for his wife "by way of fine [imposed] on a [consenting]

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[638] Semerdjian, *"Off the Straight Path,"* p. 31; Heyd, *Old Ottoman Criminal Law*, p. 95-103.
[639] Semerdjian, *"Off the Straight Path,"* p. 31.
[640] Ze'evi, *Producing Desire*, p. 60.
[641] Ze'evi, *Producing Desire*, p. 60, 64.
[642] Ibid.
[643] Ibid., 64-5.
[644] Ibid., 64.

cuckold," and 300 *akçes* for himself. If he is of average standing, he is entitled to pay 50 *akçes* and if he is poor he ought to pay 40 or 30 *akçes*.[645]

Shubha (resemblance) was yet another principle that the *kanun* utilized to deal with *zina*. Following a Hadith by Prophet Muhammad—"Ward off the fixed punishments from the Muslims on the strength of *shubha* as much as you can"[646]—*shubha* can be used as a method where there is judicial doubt to avoid being punished for *zina*. In such case, the offender usually claims that he believed that the act was licit. This happens just as in the case of quasi-ownership of a female slave, or if the woman and man involved believe they were legally married and there was no intention for them to commit *zina*.[647] In Ottoman law, for the act to be considered a crime, the offender has to have intent or prior knowledge of the act he is committing.[648] This follows the *shari'a* endorsement of *shubha* where in case a man retracts his confession, he is prompted to say: "Perhaps there was *shubha*, or [I] only kissed, or touched her."[649] This principle was often used and encouraged by jurists as a loophole in order to avoid punishment.

Ottoman fatwas played a role besides the *kanun* in regulating public morality and the sexual arena. A number of fatwas by the *seyhulislam* Ebu's-su'ud is concerned with crimes of sexual transgressions. One of his fatwas considers rape as *zina* and prescribes the *hadd* punishment for it in conformity with the *shari'a*:

> Q: If Zeyd without being married to Hind takes her by force, what should happen to Zeyd?

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[645] Heyd, *Old Ottoman Criminal Law*, p. 96-97; Ze'evi, *Producing Desire*, p. 64; and Pierce, Leslie. "Seniority, Sexuality, and Social Order: The Vocabulary of Gender in Early Modern Ottoman Society," in Women in The Ottoman Empire: Middle Eastern Women in the Early Modern Era. Eds. Madeline C. Zilfi. Leiden: Brill, 1997, p. 169-196.
[646] Ze'evi, *Producing Desire*, p. 30.
[647] Ibid., 32.
[648] Ibid.
[649] Imber, *Ebu's-Su'ud*, p. 25.

> A: If he is a *muhsan* [a married Muslim], he will be killed.[650]

Another rather compelling fatwa here legalizes a woman's killing of her husband by poisoning him if he divorces her and tries to commit *zina* with her by force. In such case, she is not liable for the payment of blood money, as poisoning her husband would be considered a case of self-defense:[651]

> Q: Zeyd says, "If I do this thing, may my wife be divorced three time." He then does it. His wife knows this, but is unable to prove it. Is Zeyd's wife a sinner because Zeyd is intimate with her?
> A: It is fornication (*zina*). It is essential that she does not [submit] voluntarily [to Zeyd's embrace]. She must give what she has and there must be a *khul'* divorce. If he tries to have intercourse [with her] and there is no other means of escape, it is licit according to the *shari'a* to add poison to his food. She would not commit a sin and there is no *diya* (blood money).[652]

There are a number of differences in the way *kanun* and *shari'a* deal with crimes of sexual transgressions that one could recognize. Intent associated with guilt was one aspect that was considered in Ottoman law. If a person breaks into a house without committing any offence, he is still considered guilty if he had the intent of committing a crime.[653] Following the same line of reasoning, if a man is found in a house alone with a woman then it is assumed that their intent was to commit *zina* in spite of whatever action was taking place. This point is different from the shari'a given that "seeing" and "touching" could be considered *zina* in accordance with Islamic legal provisions.[654] Another major aspect that underpins the dissimilarities between both legal codes is the imposition of fines. As mentioned in earlier chapters, one of the possible reasons behind

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[650] Semerdjian, *"Off the Straight Path,"* p. 50.
[651] Ibid., 51.
[652] Ibid. For a further reading on this subject, see Imber, Colin. "Why You Should Posion Your Husband: A Note on Liability in Hanafi Law in the Ottoman Period." *Islamic Law and Society*, Vol. 1, No. 2 (1994): 206-216.
[653] Semerdjian, *"Off the Straight Path,"* p. 56-7.
[654] Ibid., 57.

the Ottoman 'fiscalized' forms of punishments might have been owed to the fact that they were a source of revenue. Some crimes are punishable by both a form of discretionary punishment and a monetary fine, as shown in Article 22 of the Ottoman Criminal Code:

> "If a person has sexual intercourse with his wife's female slave or with his mother's or father's female slave or with his wife after having divorced [her] irrevocably, the cadi shall chastise [him] and a fine of two *akçe* shall be collected for each stroke."[655]

It is important to note here that even though the fatwas of Ebu's-su'ud often seem to prescribe of a hadd punishment, this was not necessarily what was applied in court. Heyd argues that, "Stoning to death, though prescribed in many Ottoman fatwas as the required penalty for certain cases of fornication, seems to have been inflicted only in very rare cases."[656] Thus, it seems that Ottoman law aimed at creating a more enforceable system of legal procedure that at times broke away from the essence of the *shari'a*.

Prostitution

Prostitution fell under the category of *zina* and was the subject of a lot of juristic deliberations. In Hanafi Legal doctrine, there have been many endeavors aimed at trying to pinpoint what type of crimes of sexual transgressions constituted the *hadd* punishments.[657] Seeing the rigidity set forth by the shari'a in establishing a crima of *zina*, Hanafi jurists often attempts to limit the scope of what dictates a crime that necessitates a hadd penalty. Some were even of the opinion that such indecencies should be concealed so long as a case of *zina* could not be proven.[658] One of the few cases where the *shari'a* provisions enforced a fixed punishment of eighty lashes was slander (*qadhf*)—falsely

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[655] Heyd, *Old Ottoman Criminal Law*, p. 100.
[656] Semerdjian, *"Off the Straight Path,"* p. 58.
[657] Baldwin, *Prostitution*, p. 121.
[658] Ibid., 123.

accusing someone of committing fornication.[659] However, when it comes to prostitution, Hanafi jurists did not consider the case as an offence that infringed on *hudud* Allah. As mentioned above, there is a lot of ambiguity that surrounds the cases of *zina* and how to deal with them. Hanafi jurists were reluctant in stipulating that certain cases would be deemed as *zina*. As such, they were of the opinion that at times illicit practices could bear a resemblance to licit practices, and on the occasion that the legality of a case of *zina* is questioned, then the fixed punishment could not be imposed.[660]

Prostitution is a case in point. Seeing as that it involves some form of payment for sexual intercourse paid by a client, it bears resemblance to the payment of a dowry required by marriage or concubinage where a husband entertains his sexual rights.[661] Hence, there is *shubha* when it comes to outlining the legality of prostitution that would not necessarily incur the fixed penalty. The ambiguity is caused, as argued by the Hanafi jurists, when a man says the words "I give your this dowry in order to commit *zina* with you."[662] According to jurists, this would be an obvious crime transgressing hudud Allah and would require the hadd punishment.[663] Hence, the shari'a provisions are not explicit in respect to whether prostitution is deemed as an illegal or legal act. According to a 17th Century Ottoman jurist, he argues that, "sex for hire did not warrant the hadd punishment required for *zina*;"[664] thus, it was a more complicated crime to establish than *zina*. Furthermore, the Hanafi legal doctrine also dictates that, "if a man hires a woman to

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[659] Baldwin, *Prostitution*, p. 123.
[660] Ibid., 125.
[661] Ibid., 125.
[662] Ibid., 126.
[663] Ibid., 129. This is again different from Ottoman law in regards to intent that could alone establish an offence without such a verbal pronouncement.
[664] Semerdjian, *"Off the Straight Path,"* p. 32-3.

fornicate with her and does so…is subject to ta'zir.[665] Hence, there were no comprehensible legal codes that substantiate how prostitution should be dealt with. However, prostitution also raised a number of questions other than committing illicit sexual intercourse, which are: procuring, soliciting, public indecency, human trafficking, and disrupting of neighborhood security, which might have made it all the more difficult to deal with.[666]

Under the Ottoman Criminal Code, prostitution was not only a matter of committing sexual transgressions, but it was also regarded as a social and moral issue. It is dealt with in Chapters II (On Mutual Beating and Abuse, Killing and the Fines for Them) and III (On Fines and [Capital or Severe Corporal] Punishment for the Drinking of Wine, Theft, and Robbery and [other] Transgressions, Etc) of Suleyman I's *kanunname*.[667] According to Article 57:

> "If a person practices procuring, the cadi shall chastise [him or her] and expose [him or her to public scorn; in addition] a fine of one *akçe* shall be collected for each stroke."[668]

However, there are no explicit provisions in the kanunname stipulating specific punishments to prostitutes or their clients. As mentioned in Article 57, procuring is the case often dealt with more clearly in the *kanun*. Other than being sentenced to a form of discretionary punishment and a payment for each stroke, the offender committing procurement is also punished by being subjected to branding of the forehead or public scorn.[669] Another *kanun* provision dealt with the issue of disrupting of the neighborhood, which was considered to be within the scope of prostitution. Members of a neighborhood

[665] Calder, *Islamic Jurisprudence in the Classical Era*, p. 26.
[666] Ibid., 129.
[667] Heyd, *Old Ottoman Criminal Law*, p. 104-128.
[668] Heyd, *Old Ottoman Criminal Law*, p. 110.
[669] Baldwin, *Prostitution*, p. 135.

could appeal to court that a given person, who was considered as either a criminal or indecent, be banished from the neighborhood.[670]

James Baldwin states that, "banishment from a neighborhood, rather than corporal and pecuniary punishments mentioned elsewhere in the *kanunname* and in fatwas, was by far the most common response to prostitution."[671] When members of a neighborhood came forth in seeking the banishment of a certain individual or a group of individuals, former were not obliged to prove beyond doubt that a person has committed prostitution or procurement or that any sexual transgressions had occurred.[672] The *kanun* granted the right to members of the neighborhood community to request the banishment of certain individuals whom believed disrupted the security of the neighborhood with their acts. However, the plaintiffs had to be careful with the language that they used in their appeal before the court so they would avoid being accused of slander (*qahdf*) and would not be sentenced to a punishment of eighty lashes. They rather chose to use certain ambiguous terms, such as "off the straight path," to hint at the sexual misconduct or immorality of a person.[673]

Prostitution was also reflected in the fatwas of Ebu's-su'ud. In this fatwa, the *seyhulislam* deals with prostitution as a crime of *zina*:

> Q: If a group makes it a custom to go from village to village, causing their wives, daughters and female slaves to commit fornication, what is their sentence according to the shari'a?
> A: They should all, without exception, suffer an extremely severe chastisement and not be released from prison until their reform becomes evident. Those women whose fornication is proven should all be stoned.[674]

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[670] Baldwin, *Prostitution*, p, 136.
[671] Ibid.
[672] Ibid.
[673] Ibid., 138.
[674] Semerdjian, *"Off the Straight Path,"* p. 50.

It is interesting to note here that according to the Bursa court records examined by Gerber, the bulk of the cases dealing with prostitution all asserted that the prostitutes were caught committing the act of *zina*. However, even though the obvious *shari'a hadd* penalty was either flogging or stoning to death, none of the cases demonstrate that such punishments were enforced. In most cases, the prostitute is either banished from the neighborhood or subjected to discretionary punishment.[675]

[675] Gerber, *State, Society, and Law in Islam,* p. 73.

Conclusion

As seen in the previous chapters, the doctrine of the *shari'a* to a large degree was broadened by the regulations set forth by the *kanun*. The way law was imposed from above by the state and dealt with on the grassroot level of society serves as a mixture of the two legal codes. However, the question that remains, to what extent did it matter which law was applied? Aside from the clear-cut innovations that the sharia introduced in the Ottoman legal process, people were presenting their cases before the court knowing full-handedly that they now had a place to bring their private matters into the public sphere. Even though the imposition of new Ottoman policies was at times met with opposition, the court became an integral element in people's daily lives. It served as the nexus between state and society where it mediated almost all types of cases ranging from crimes, to family, to taxes, etc. According to Hanna, "Justice was quick and simple. There were no long delays and no complicated procedures."[676] To know the extent of the viability of this requires a more closer and comprehensive study of court records in the core areas of the empire as compared to the provincial areas to have a clearer understanding of the day-to-day interactions of the people. Unfortunately, though the court records provide for a rich historical authority, they are still lacking in some respects wherein the full dimensions of the cases were not explicated and only the basic summaries and highlights were records. Nevertheless, they have been the commanding form of evidence when it comes to the history of the Ottoman Empire.

The innovations in the Ottoman legal administration constituted a fundamental portion of Ottoman history. The loosening of laws to accommodate contemporary

[676] Hanna, "Marriage among Merchant Families," p. 145.

practices and place them within the confines of the law through practicality, adaptability and flexibility reconfigured the entire structure of Ottoman legal thought. There have been many contributions and efforts by the state functionaries to reconcile the *kanun* with the *shari'a*. However, Ottoman legal provisions retained a more pragmatic character than that of the *shari'a* as certain cases under the latter's doctrinal traditions were not expanded on or were not quite clear. Thus, the *kanun* could be regarded as having served as an extension of the *shari'a* in dealing with more contemporary issues under the justification of the *maslaha* of society. As such, Baldwin alleges that the way *qadi* courts came to deal with certain crimes in regulating society "cannot be characterized as the non-application of Islamic law."[677] However, when examining the *kanun-shari'a* discourse, one has to consider that the *shari'a* has been interpreted in a number of ways and there have been a lot of efforts in circumventing certain legal Islamic regulations to make ends meet. This goes back to the idea that Islam is not the same everywhere.

The Empire was keep to bring in line all its provinces together and create a nucleus of centralized power through standardizing and unifying the law of procedure and the judicial system throughout the empire. The Ottoman authorities were keen to enjoin their subjects to adjust to the new innovations, and the *kanun* served as a tool in doing so. A way to impose the state's hegemony was by making people accountable for their actions before the law and by integrating them into the judicial system. Nonetheless, people had little choice by to adapt and adopt the Ottoman modifications injected into their societies. The degree of power that the state exercised by the 16th Century over large territories with extended frontiers and a more diverse population was one way to enforce its hegemony. For the continuation of an empire over a number of centuries, despite

[677] Baldwin, *Prostitution*, p. 119.

elements of decline, it had to become a pervasive force of change. Even though there was a process of secularization taking place in adopting the newly codified Ottoman laws, there was always the dichotomy between law and application—theory and practice—that the state was faced with; hence the many efforts of reconciliation and attempts to create a symbiosis of legal codes. However, as Heyd clearly puts it, "the *kanun* is conceived as a supplement to the *shari'a*, theoretically inferior to it but prevailing over it in practice."[678] Despite the attempts of the empire to retain its religiosity, there were constant ventures to make the law more adaptable and pragmatic.

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[678] Heyd, *Old Ottoman Criminal Law*.

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